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Re: Hovis v. Hughes, C.A. No. 99C-01-293 SCD
On Defendant's Motion for New Trial. DENIED

Dear Counsel:

Defendant, Kathy Hughes, has moved for a new trial following a jury verdict returned against her on November 2, 2001. The trial resolved allegations that plaintiff, Regina Hovis, was injured in an automobile accident caused by defendant's negligence. Plaintiff, Kevin Hovis, presented a claim for loss of consortium. The defendant admitted fault for the accident but denied that the accident proximately caused injury to either plaintiff. The jury deliberated for several hours before ultimately returning a verdict in favor of Regina Hovis for $80,000. The jury declined

to award damages to Mr. Hovis for loss of consortium.

The November 2 verdict marks the second time a jury has decided this case. The case was tried for the first time in January, 2001. During that trial, the Court allowed the defendant to introduce as evidence photographs of the vehicles involved in the accident. The photographs depicted minor damage. The jury returned a verdict of $1000 in favor of Mrs. Hovis. Thereafter, plaintiffs moved for a new trial on the grounds that the court improperly had declined to read certain *voir dire* questions and improperly had admitted the photographs of the vehicles. Between the trial and the motion for new trial, the Delaware Supreme Court decided *Davis v. Maute.*[1] In essence, *Davis* held that it was error to admit photographs depicting vehicle damage to support an inference of minimal injury absent expert testimony regarding the correlation between property damage and injury.[2] Based on *Davis,* the trial court determined that it had improperly admitted the photographs during the first trial and granted a new trial.[3]

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[1]Del. Supr., 770 A.2d 36 (2001).

[2]*Id.* at 40.

[3]*See Hovis v. Hughes*, Del. Super., C.A. No. 99C-01-293, Del Pesco, J. (May 11,

2001)(Mem. Op.)(citing *Davis)*.

Prior to the second trial, plaintiffs moved *in limine* to exclude the photographs. Defendant responded by arguing that the photographs were admissible because she had secured the testimony of two of Regina Hovis' treating physicians to the effect that the higher the energy generated by the force of impact of a collision the more likely that an occupant of the vehicles will sustain significant injury. After reviewing the testimony, and considering argument, the Court ruled that the photographs were inadmissible under *Davis*. Specifically, the Court concluded that the defendant had failed to present **competent** expert testimony with respect to the correlation between vehicle damage and injury.[4]

The case was tried over three days. Plaintiffs' evidence revealed that Ms. Hovis was 27 years old at the time of the accident. She was healthy. She had no history of traumatic injury. As a result of the accident, she incurred just under $5000 in admissible medical expenses. And she sustained a permanent soft tissue injury to her cervical spine.

Defendant's motion for new trial raises two issues. First, she argues that the

[4] *See Davis,* 770 A.2d at 40 ("As a general rule, a party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to the extent of damage to the cars, unless a party can produce **competent** expert testimony on the issue")(emphasis supplied).

jury's verdict was excessive and against the great weight of the evidence. Second, she argues that the Court improperly excluded the photographs from the trial, and that this error was sufficiently prejudicial to warrant a new trial.

When considering a motion for new trial under Rule 59, the Court must appreciate that "[t]raditionally, the court's power to grant a new trial has been exercised cautiously with extreme deference to the findings of the jury."[5] Further, "when the case involves a controverted issue of fact in which the evidence is conflicting and out of the conflict may be gathered sufficient evidence to support a verdict for either party, the issue of fact will be left severely to the jury...."[6] The Court will not upset the verdict of a jury unless "the evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result."[7] Stated differently, "[a] jury's award is presumed correct and just unless so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of

[5]*Maier v. Santucci,* Del. Super., 697 A.2d 747, 749 (1997)(citation omitted).

[6]*Storey v. Camper,* Del. Supr., 401 A.2d 458, 462 (1979).

[7]*Id.* at 465.

justice."[8]

[8] *Porter v. Murphy*, Del. Super., C.A. No. 99C-08-258 RRC, Cooch, R.J. (Oct. 2, 2001)(Mem. Op. at 3-4)(upholding jury verdict of $60,000 in a soft tissue injury case).

The Court's conscience is not shocked by the jury verdict in this case. The jury heard conflicting evidence with respect to damages and, by its verdict, announced that it believed the plaintiffs' experts over the defendant's expert. Weighing conflicting testimony is within the sole province of the jury.[9] Moreover, Ms. Hovis is a young woman with a long life expectancy. The preponderance of the evidence indicated that she will suffer from her injuries for the remainder of her life. While not disabling, her injuries were painful and disruptive of her activities of daily living. Clearly, the jury was persuaded by her testimony and was of the collective view that she should be compensated substantially for the impact this accident has had upon her life.

[9] *See Savage v. Cooke,* Del. Super., C.A. No. 94C-01-210, Quillen, J. (Oct. 27, 1995)(Letter Op.)(credibility determinations made by the jury should not be disturbed even if the trial judge may have assessed the witnesses' credibility differently).

The Court is mindful that the disparity between the first jury verdict and the second is $79,000. Presumably, the evidence presented, save the photographs, was identical or nearly identical.[10] But something in the presentation of the evidence during *this* trial compelled the jury to the conclusion that substantial compensation was justified. What that "something" was is difficult to say. Different evidence moves different juries to different conclusions. But the jury system admits of this disparity and, indeed, it embraces the different perspectives our jurors bring to dispute resolution. Thus, when considering motions for new trial, the trial court should never lose sight of the fact that "[t]rials involve risk and those of us involved in the judicial system cannot make litigation risk-free."[11] The Court has not been persuaded that this case justifies the drastic step of setting aside the jury's determination of damages. The verdict will not be disturbed.

With respect to the admission of the photographs, the Court stands by its ruling before trial. Defendant failed to present any witness who was expert in the assessment of vehicle property damage. The expert testimony proffered by the defendant competently addressed the correlation between force of impact and injury.

[10]This judge did not preside over the first trial.

[11]*Savage,* supra, Letter Op. at 3; *Hayes v. Bartoli,* Del. Super., C.A. No. 99C-03-299 SCD, Slights, J. (Feb. 27, 2001)(Letter Op. at 8)(quoting *Savage* in support of decision to uphold jury's "zero damages" verdict).

Accordingly, the parties were permitted to present evidence at trial regarding the force of impact because the expert foundation offered to the jury eliminated the risk that the jury would improperly speculate regarding the correlation between force of impact and injury.[12]

[12]*See Sloan v. Davis*, Del. Super., C.A. No. 00C-03-176 JRS, Slights, J. (Dec. 19, 2001)(Mem. Op. at 14-15)(holding that expert witness must competently address correlation between force of impact and injury before evidence regarding force of impact is admissible).

The risk of "unguided speculation" still remained, however, with respect to the correlation between property damage and force of impact and/or property damage and injury.[13] None of the experts who testified in this case claimed any competence in the evaluation of vehicle damage, and the record did not allow the Court to infer such expertise from the experts' education, training or experience.[14] Absent expert correlation of vehicle damage and injury, the photographs were highly prejudicial with little probative value.[15] Accordingly, the Court exercised its discretion in accordance

[13]*Davis,* 770 A.2d at 40 ("Absent [competent] expert testimony, any inference by the jury that minimal damage to the plaintiff's car translates into minimal damage to the plaintiff would necessarily amount to unguided speculation").

[14]*See* D.R.E. 702. *See also Sloan,* supra (Mem. Op. at 9)(orthopaedic surgeon not qualified to interpret vehicle damage depicted on a photograph by virtue of his medical training and experience alone).

[15]D.R.E. 403. The Court acknowledges that its decision to exclude the photographs was significant. As stated, the first trial - - during which the photographs were admitted - - resulted in a $1000 verdict for the plaintiffs. The second trial - - before which the photographs were excluded - -

with *Davis* to exclude the photographs as evidence at trial.

The jury's verdict was not against the great weight of the evidence. Nor did the Court commit legal error when it excluded the photographs of the vehicles as evidence at trial. Accordingly, defendant's motion for new trial is **DENIED.**

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resulted in a $80,000 verdict for the plaintiffs. Aside from the photographs, the evidence presented at both trials was nearly identical. Thus, it might be said that "a picture is worth... about $79,000." The disparity in the jury verdicts in this case is perhaps the best evidence of the highly prejudicial nature of photographic evidence in low impact automobile accident cases. It is this potential for prejudice which underscores the need to admit this evidence only after it has been placed in its proper context by competent expert testimony.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary