IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DEMONA DANIELS	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 98C-12-009 RRC
	)	
DONNA FONTANA,	)	
	)	
Defendant.	)	

Submitted: April 2, 2001
Decided: June 4, 2001

Upon Plaintiff's "Motion for New Trial or in Alternative a[n] Additur." DENIED.

This 4th day of June, 2001, upon consideration of the submissions of the parties, it appears to this Court that:

1. Demona Daniels (Plaintiff) brought suit against Donna Fontana (Defendant) for personal injuries and damages sustained by Plaintiff in an automobile accident which occurred on March 11, 1997. The accident occurred at the intersection of Winding Lane and Philadelphia Pike in Claymont, Delaware. At the time of the accident Plaintiff had proceeded in a southbound direction on Philadelphia Pike. After stopping at a stop sign on Winding Lane Defendant attempted to cross Philadelphia Pike to enter a shopping center. Defendant's car

struck Plaintiff's car at some point between the right shoulder of the southbound lanes and the center median of Philadelphia Pike.[1] This apparently then caused Plaintiff to hit a tree. Defendant claims that Plaintiff was contributorily negligent.

2. The case proceeded to a two day jury trial. During the trial, William R. Atkins, MD testified on behalf of Plaintiff that Plaintiff had sustained certain injuries as a result of the March 11, 1997 automobile accident. Delaware State Police Corporals Anita McCloskey and Jeffrey W. Weaver, the investigators of this accident, also testified at the trial. The sole issue concerning Plaintiff's contributory negligence was whether or not Plaintiff's headlights were turned on at 8:00 p.m. at the time of the accident. Plaintiff testified that she was certain she had turned on her headlights before entering the roadway.[2] However, Defendant testified in essence that

> [Defendant] looked for oncoming traffic while she was stopped at the stop sign before proceeding. [Defendant] indicated that she did not

[1] Defendant' Response at ¶ 1.

[2] Defendant also noted that Plaintiff "acknowledged her vehicle was new and [Plaintiff] wavered when testifying regarding the mechanism for operating the headlights." Defendant's Response at ¶ 2.

> observe [Plaintiff's] vehicle approaching before she proceeded. When [Defendant] eventually saw [Plaintiff's] vehicle it was too late to avoid the accident. [Defendant then] explained that she had not observed the plaintiff's vehicle sooner because its headlights were not on.[3]

Corporal Weaver was called to the accident to assist Corporal McCloskey with the investigation. Corporal Weaver inspected Plaintiff's headlights on her vehicle and found evidence which led him to conclude that Plaintiff's parking lights were on, but Plaintiff's headlights were off at the time of impact.

Corporal McCloskey testified that she issued Defendant a traffic citation for failure to remain stopped at a stop sign. Corporal McCloskey also apparently testified that Corporal Weaver's findings, regarding Plaintiff's headlights, had not caused her to change her decision to issue Defendant a traffic citation for failure to yield the right of way. Thus, Defendant was issued the traffic ticket, which Defendant paid.

[3] Defendant's Response at ¶ 2.

Defendant testified that she paid the traffic ticket issued by Corporal McCloskey because she was leaving the country for a family vacation shortly after this accident had occurred.[4] Plaintiff claims that "Defendant was given a traffic citation and admitted she was responsible for the accident."[5]

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[4] Defendant' Response at ¶ 5.

[5] Plaintiff's Motion at ¶ 5.

After a two day trial, the jury returned a verdict finding that both Plaintiff and Defendant acted negligently in causing the accident. The jury found Plaintiff to be 85% contributorily negligent and that Defendant was 15% negligent. Because Plaintiff was assigned a greater percentage of negligence by the jury, Plaintiff was precluded from recovering any damages.[6]

3. Plaintiff then filed a "Motion for a New Trial or in the Alternative a[n] Additur." Defendant filed a Response in Opposition to this motion. Plaintiff claims that the jury's verdict "was against the great weigh[t] of [the] evidence" and that "the jury['s] [assignment of] 85% contributory negligence is not reasonabl[y] related to the evidence in this case."[7] Plaintiff essentially contends that since Corporal McCloskey issued Defendant the traffic citation and because Defendant paid the ticket, the jury's verdict, which allocated more than 50% of the negligence to Plaintiff, is "clearly erroneous."[8] Plaintiff also claims that racial bias played a role in the jury selection as "[o]ne black [was] picked in jury selection and was

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[6] "In all actions brought to recover damages for negligence which results in death or injury to person or property, the fact that the plaintiff may have been contributorily negligent shall not bar recovery by the plaintiff or the plaintiff's legal representative where such negligence was not greater than the negligence of the defendant or the combined negligence of all defendants against whom recovery is sought, but any damages awarded shall be diminished in proportion to the amount of negligence attributed to the plaintiff." 10 *Del.C.* § 8132.

[7] Plaintiff's Motion at ¶ 3.

[8] Plaintiff's Motion at ¶ 5.

struck by Defendant for some unknown reason . . . and it is unknown why the Defendant strike [sic] the only black juror selected."[9]

[9] plaintiff's Motion at ¶ 7.

4. Defendant contends that there was “ample evidence proffered at trial to support the jury’s finding in favor of [Defendant].”[10] The issue of Plaintiff’s contributory negligence centered on the question of whether or not Plaintiff was operating her vehicle without the headlights at 8:00 p.m.[11] Defendant notes that there was conflicting testimony on this issue, but argues that the jury was entitled to accept Defendant’s testimony which was corroborated by Corporal Weaver’s findings after his investigation of the accident. Defendant also asserts that Plaintiff has waived her right to challenge the jury’s composition as “plaintiff sat silently during *voir dire* without raising a challenge to the defense’s use of its peremptory strike.”[12] Defendant argues that “plaintiff has failed to make a prima facie showing

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[10] Defendant’s Response at ¶ 2.

[11] Plaintiff’s Motion at ¶ 3.

[12] Defendant’s Response at ¶ 7.

of discriminatory intent [and Plaintiff] has inexplicably waited to raise its *Batson*[13] challenge until the post-trial stage of the proceedings."[14]

[13] *See Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (holding that a defendant may establish a prima facie case of purposeful discrimination in petit jury selection solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial, but to do so the defendant must first show that he is a member of a cognizable racial group, that the prosecutor has exercised peremptory challenges to remove members of the defendant's race and that the facts and circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the jury based upon their race.).

[14] *Id.*

5. When considering a motion for a new trial, the jury's verdict is presumed to be correct.[15] When considering a motion for a new trial, the Court must determine whether the jury's verdict is against the great weight of the evidence.[16] A jury's verdict should not be disturbed unless it is manifest that it was the result of passion, prejudice, partiality or corruption, or that it was clearly in disregard of the evidence or applicable rules of law.[17] The verdict must be manifestly and palpably against the great weight of the evidence or for some reason, or a combination of reasons, justice would miscarry if it were allowed to stand.[18] Furthermore, enormous deference is given to jury verdicts under Delaware law.[19]

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[15] *Lacey v. Beck*, Del. Super., 161 A.2d 579, 580 (1960).

[16] *James v. Glazer*, Del. Supr., 570 A.2d 1150, 1156 (1990).

[17] *Storey v. Camper*, Del. Supr., 401 A.2d 458, 465 (1979).

[18] *McCloskey v. McKelvey*, Del. Super., 174 A.2d 691 (1961).

[19] *Young v. Frase*, Del. Supr., 702 A.2d 1234, 1236 (1997) (citing the Delaware Constitution which reads that "on appeal from a verdict of a jury, the findings of the jury, if

supported by the evidence, shall be conclusive." DEL. CONST., art. IV, § 11(1)(a)).

6. Plaintiff's claim that she is entitled to a new trial because the jury's verdict is against the great weight of the evidence is unsubstantiated in her Motion for a New Trial. As Defendant stated, "where there are conflicting accounts of an accident, the jury is entitled to weigh the credibility of the parties to determine which version to accept."[20]

This Court finds that the jury's finding assigning Plaintiff 85% negligent (in not having her headlights turned on at 8:00 p.m.) and Defendant 15% negligent (in not remaining stopped at the stop sign), is not against the great weight of the evidence. As in many automobile trials, conflicting evidence was presented to the jury. Plaintiff testified she was certain her headlights were on. Defendant testified that she did not see Plaintiff's vehicle while Defendant was stopped at the stop sign because Plaintiff's headlights were off. Defendant's testimony, apparently believed by the jury was corroborated by the findings of Corporal Weaver.

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[20] *See Young* at 1237 (stating that "the jury is the sole trier of fact responsible for assessing the credibility of witnesses, resolving conflicting testimony and drawing inferences from proven facts.").

Plaintiff's contention that there was absolutely no defense as to "why Defendant didn't even see the parking lights" overlooks the fact that the jury did not completely absolve Defendant of negligence. The jury found that both parties had been negligent in causing the accident, but the jury must have determined that Plaintiff was more negligent than Defendant in not having her headlights turned that night. This jury was entitled to weigh the evidence presented before it, and determine the credibility of the witnesses who testified. As it has been held in previous Delaware cases, "[a] jury is free to accept or reject in whole or in part testimony offered before it, and to fix its verdict upon the testimony it accepts."[21]

7. Plaintiff's also contends in her Motion that Plaintiff was denied a fair and impartial jury due to the fact an African-American individual was struck from the jury panel. During the jury *voir dire* and the two day jury trial Plaintiff never made an objection to this particular juror being stricken from the jury panel. Plaintiff, instead has delayed raising this claim until this post trial Motion for a New Trial.

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[21] *Gier v. Kananen*, Del. Super., No. 522, 1992, Horsey, J. (June 7, 1993) (ORDER) (citing *Debernard v. Reed*, Del. Supr., 277 A.2d 684, 685-686 (1971)).

Plaintiff did not timely object during the *voir dire*. Plaintiff instead delayed raising this claim until filing a post trial Motion for a New Trial. Delaware case law is clear on this issue. "The proper way to enforce the right [to a preemptory challenge] is to require a party to exercise his right of challenge of jurors actually drawn when the opportunity arises, and if he decides not to do so at that time, to regard that failure as evidence of his satisfaction with the jurors then drawn and the waiver of his right to challenge any of them."[22] Therefore, because Plaintiff did not make a timely objection to Defendant's peremptory challenge during *voir dire*, Plaintiff has waived her right to challenge that strike.

8. Turning to Plaintiff's Motion for Additur, this Court finds that additur is not warranted in this case. First and foremost, although "additur" is referred in the caption of the motion and in the concluding paragraph, nowhere in the motion is the concept of additur argued. Therefore, this Court finds that Plaintiff has abandoned any claim for additur. Secondly, additur should be denied on the merits. This Court's function upon review of the jury's decision is to ascertain

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[22] *Le Gro v. Moore*, Del. Supr., 138 A.2d 644, 646 (1958). *See also Ericson v. Walp*, Del. Supr., 511 A.2d 381 (1986) (holding that "[w]hen an opportunity is afforded a party to exercise a peremptory challenge, a statement of "content" has the same effect as an affirmative exercise of the statutory right; and whether exercised or waived, the right has been tendered and expended.").

whether or not a reasonable jury could have reached that result.[23] As the Delaware Supreme Court has previously held, "[a] motion for additur is an expedient but intrusive way of adjusting a jury's award in exceptional cases where the amount of the award is shockingly inadequate."[24] This Court finds that the jury's decision to find Plaintiff 85% contributorily negligent completely eliminates any amount of an award for Plaintiff according to the laws of Delaware.[25] Similarly, this case is not an exceptional situation where the award is shockingly inadequate. The jury was well within its discretion when it found Plaintiff more than 50% negligent. Accordingly, Plaintiff's request for additur is **DENIED.**

9. For the above stated reasons, Plaintiff's "Motion for a New Trial and a[n] Additur" is **DENIED.**

IT IS SO ORDERED.

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[23] *Young v. Frase* at 1237.

[24] *Young v. Frase* at 1238.

[25] *See* 10 *Del. C.* § 8132.

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cc: Prothonotary
Leo J. Rammunno, Esquire, Attorney for Plaintiff
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