SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY
COURTHOUSE
GEORGETOWN, DE 19947

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Re: ***Hedenberg v. Best***
C.A. No. 03C-08-036-RFS

Upon Plaintiff's Motion for New Trial: Denied
Upon Plaintiff's Motion for Additur: Granted.

Submitted: July 1, 2005
Decided: July 11, 2005

Dear Counsel:

This is a personal injury suit arising from an automobile accident on March 30, 2002. The Plaintiff, Helka Hedenberg (hereafter "Hedenberg"), was lawfully stopped on Rehoboth Avenue in Rehoboth Beach, Delaware. The Defendant, Kerri L. Best (hereinafter "Best"), ran into the back of Plaintiff's car. During a two-day trial, the

Defendant admitted negligent driving through inattention and acknowledged the rear end collision was her fault. The nature and extent of Plaintiff's injuries were at issue. The jury returned a zero sum verdict. Plaintiff has moved for a new trial, claiming an award of at least a minimal amount was required as a matter of law. In the alternative, Plaintiff has requested additur.

The principles on a motion for a new trial are too well known to require any citation. The Court must determine whether the verdict is against the great weight of the evidence. A verdict will be set aside if it clearly was the result of passion, prejudice or partiality, or it was manifestly in disregard of the evidence or rules of law. A jury verdict is entitled to great deference, and it will not be disturbed where it has sufficient evidentiary support. Of course, the jury determines credibility. Ultimately, a jury verdict will not be set aside unless its judgment is shocking to the conscience of the Court.

Zero verdict cases have received a fair amount of attention. In *Maier v. Santucci*, 697 A.2d 747 (Del. 1997) the defendant's medical expert concluded that "Maier did probably sustain a cervical sprain injury as a result of the accident." The Supreme Court ruled that "[o]nce the existence of an injury has been established as causally related to the accident, a jury is required to return a verdict of at least minimal damages." *Id.* at 749.

As the parties know, the subject was discussed later in *Amalfitano v. Baker*, 794 A.2d 575 (Del. 2001). There, plaintiff's two medical experts testified that "based upon both Amalfitano's subjective complaints and *the results of their objective tests,* . . . the . . .

accident proximately caused her injuries." *Id.* at 576. The defendant did not have contrary expert opinions. After a zero verdict was entered, the Supreme Court held:

> Despite the general deference of our courts to the findings of a jury we held in *Maier v. Santucci* that a verdict of zero damages is inadequate and unacceptable as a matter of law where uncontradicted medical testimony establishes a causal link between an accident and injuries sustained.

Id. at 577.

The Supreme Court reviewed the law last year in *Walker v. Campanelli*, 860 A.2d 812 (Table), 2004 WL 2419104. The Court said:

> In a personal injury suit, "if a plaintiff conclusively proves an injury worthy of compensation resulting from the defendant's tortious conduct, the plaintiff is entitled to at least some amount of damages." Where uncontested medical evidence links on [sic] injury to its proximate cause and is confirmed by independent objective testing, a jury award of zero damages is against the weight of the evidence. The law, however, does not compensate for every loss and the jury serves as the conscience of the community, sending a message to exaggerating and overly litigious claimants. In determining whether a compensable injury resulted from the defendant's tortious conduct, a jury may reject an expert's medical opinion when the opinion is substantially based on the subjective complaints of the patient. Further, when medical experts differ on objective findings, the jury is free to believe whichever expert they find to be more credible. "The determination of the credibility and reliability of different experts is an area uniquely left to the jury to decide and may not be overturned unless there is no reasonable basis to support that decision."

Id. at *2 (citations omitted) (emphasis added).

I note that in *Walker* the plaintiff's and defendant's experts sharply disagreed over the significance of objective tests as to the claimed injuries. The jury was free to accept defendant's evidence that objective testing was not applicable. Also, the jury was able to decide that plaintiff's subjective complaints were not credible. A doctor's opinion based

only on a patient's history could be rejected in that context. Consequently, there was a reasonable basis to uphold a zero verdict.

Here, Helka Hedenberg claims cervical neck strain and lower back injuries as a result of the accident. The complaints about her lower back did not become prominent until sometime after the accident. Certainly, the jury could accept the opinion of Best's expert, Dr. Peter J. Coveleski, that Hedenberg suffered no back or permanent injuries as a result of his examination and review of the records. In other words, there is a reasonable basis in the record for the jury not to award Plaintiff anything stemming from her low back complaints.

Concerning the cervical strain, however, Plaintiff was treated at Beebe Medical Center, (hereinafter "BMC") on the date of the accident. The emergency record at BMC was introduced at trial. It reported "muscle spasm" as one of the observed conditions along with pain on movement of the neck. Her complaints of headache, neck pain and dizziness were noted.

The BMC medical record further stated:

> You have been in a car accident; however your exam today does not show any sign of serious injury . . .. You have cervical (neck) or upper back strain from the accident. This is very common following any type of automobile crash. You may feel stiff from your neck to your low back. The stiffness and pain will probably [sic] . . . over the next 24 hours. You should then feel improvement every day, but symptoms may persist for 7-10 days.

The record explained Valium is used to treat muscle spasms. It also prescribed a

cervical collar.

Muscle spasms are objective findings, and they are not under the control of individuals. No reasonable jury could infer they were faked, pretended, or imaginary. Cases on this point are represented by *Sullivan v. Sanderson*, 832 A.2d 1252 (Table), 2003 WL 22230122 (Del.) and *Mason v. Rizzi*, 843 A.2d 695 (Table), 2004 WL 439690 (Del.). Indeed, the Superior Court granted a new trial in a zero verdict case where spasms were found in *Willey v. McCormick*, 2003 WL 22803925. There, Judge Vaughn observed that a doctor's findings of spasms reflected objective testing. He concluded:

> Notwithstanding the defendant's arguments, I believe that the evidence of a neck injury, consisting of the plaintiff's complaints of neck pain following the accident, the emergency ward doctor's physical examination of the plaintiff that day which showed muscle spasm and decreased range of motion in the neck, Dr. Beneck's physical examination of the plaintiff four days later which showed a 50% limitation of range of motion of the neck, and Dr. Beneck's opinion that the neck pain was caused by the accident required the jury to return a verdict of at least minimal damages under *Maier-Amalfitano-Sullivan,* even though the neck injury resolved itself within about three months."

Id. at *4. Additur was not requested.

In this case, Plaintiff was treated by the BMC emergency room physician and personnel. Thereafter, she was seen by Dr. Hari K. Kuncha on April 30, 2002. Dr. Kuncha's opinion was post traumatic cervical spine sprain/strain related to the accident. Dr. Kuncha ordered physical therapy, collar and medications. This impression was also confirmed by Dr. Edward F. Quinn on June 18, 2002. Likewise, these complaints were related to the accident by Dr. Michael A. Gondolfo, a chiropractor. He treated Plaintiff in

September of 2002, and she has continued in his care. A consult with Dr. William Atkins dated April 28, 2003 reaffirmed the diagnosis.

Dr. Coveleski, retained by the Defendant to perform an Independent Medical Examination, was questioned on the subject. The pertinent questions and answers were:

Q. All right. Now, with respect to the neck, you testified that at best she sustained a cervical strain; correct?
A. That's right.
Q. What is a strain for the jury?
A. Well, when you talk about that, you're talking about muscle and you're talking about basically the muscle being strained or pulled. We've all had that phenomenon. And in cervical area it means it's up in the neck area.
Q. Okay. Can those be painful?
A. Yes.
Q. And you believe that as a result of the collision we're here to talk about that she sustained a cervical strain?
A. Yes.
Q. If Mr. Young were to argue to the jury at the end of the case that this accident did not cause any injury to Ms. Hedenberg, that would be incorrect based on your medical opinion and your feeling about her injuries; correct?
A. That's correct. I think she had a cervical strain.
Q. Due to this accident?
A. Yes.
Q. All right. And in looking at your report you also indicate that she had a thoracic strain as well?
A. Well, the cervical zone – cervicothoracic is still considered one area.
Q. All right. Fair enough. And I'm glad we're talking about that then. Where do we mean when we say she had a strain in her body? If you could maybe turn and point –
A. Well, she indicates that basically it's right below the large bone in your back of your neck slightly below that and up to the head.
Q. Are you talking about maybe what we think of is in between the shoulder blades going up towards the –
A. Not that low, but a little higher than that, and then moving up toward the head.

Q. Okay. Now, with respect to your opinion on the treatment she received to the neck, in your report you indicated that the work up for her injury and the treatment for her neck was appropriate through the date of April 25, 2003; is that correct?

A. That's correct.

Pl.'s Mot. for New Trial, D.I. 40, Ex.A.

Given the objective nature of the spasm findings on the day of the accident, and given the agreement of all the medical experts that the motor vehicle accident caused neck strain, there is no reasonable basis to support the jury verdict of no damages for the cervical neck strain suffered by Plaintiff. While Plaintiff appears to have overstated her injuries, the proverbial gilding of the lily cannot put her completely out of court where there is objective evidence of some injury related to the accident. Under the law she is entitled to minimal damages. For these reasons, the verdict is inadequate, is against the great weight of the evidence, and shocks the conscience of the Court.

In calculating an additur amount, the defendant is given "every reasonable factual inference" and the judge must determine "what the record justifies as an absolute minimum." *Carney v. Preston*, 683 A.2d 47, 56 (Del. Super. Ct.1996). This approach acknowledges the preferred role of the jury to express community judgements in our system of justice. In this regard, "[i]n fixing the damages, instead of directing a new trial, the Court does not usurp the providence of a jury so much as when it sets aside a verdict and directs a new trial, which the Court always has the power to do upon proper grounds." *Id.* At 56-57 (citations omitted).

In this case, Plaintiff suffered a cervical neck strain which did not require any

treatment after April 25, 2003, a period of approximately 13 months. During this time, Plaintiff declined medications and even turned down an ice pack on the day of the accident. She attended two physical therapy sessions. Plaintiff continued with her work which required some physical labor in a boutique. Her daily living activities were not seriously affected by the accident.

Plaintiff also exaggerated her claims. She claimed Defendant struck her at 45 mph on a heavily traveled road. The evidence shows traffic was stopped, and the impact was not at a significant speed. Plaintiff claimed to have stayed in her car for about 15 minutes to compose herself. Yet the more credible evidence is that she almost immediately got out of the vehicle, made no medical complaints, and picked up a paper which fell out of her purse without difficulty. On the witness stand she cried when describing all of her claimed injuries. Her reaction did not fit the facts of the case. Plaintiff also made a statement to her chiropractor that she immediately sought attention at BMC whereas there was a delay of several hours.

Given the BMC record, Plaintiff did have cervical neck strain problems which improved within 13 months. She did have sporadic episodes of stiffness and neck pain. However, her back complaints are more likely related to the aging process, and Dr. Coveleski's opinion, finding no permanency or low back injuries, is more plausible. Plaintiff was less than cooperative in Dr. Coveleski's examination. She was able to walk easily to take a phone call. She did not make a good faith effort in what should have been

a relatively effortless squatting type test. Dr. Gandolfo's testimony can be discounted. As sixty percent of his practice involves plaintiffs' personal injury claims, there is an obvious bias or prejudice. Nor was his testimony consistent as shown on cross examination. Defendant is entitled to the inference that Plaintiff exaggerated all of her injuries, and she did not suffer any back related problems from the accident.

Finally, I find that an absolute minimum award of $5,000 is appropriate for Plaintiff's cervical neck strain. The record does not support anything more or less. If Defendant agrees by written filing to an additur resulting in a total verdict and judgement to Plaintiff of $5,000, the motion for new trial will be denied as of the date of such filing and the judgement entered, without further order of the Court. Unless Defendant agrees to such additur within 10 days from the date of this order, a second trial on damages will be granted without further order of the Court. Defendant shall bear costs as the jury verdict has been set aside.[1] The Prothonotary is directed to make the appropriate docket entries.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

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[1] This decision moots the Defendant's application for costs based upon a $10,000 offer of judgment tendered before trial. Of course, settlement offers are not germane to the principal decision as they are not trial evidence. *Young v. Frase*, 702 A.2d 1234, 1237 (Del. 1997).

RFS/cv

cc: Prothonotary