IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHRISTINA CONNELLY,	)	
	)	C.A. No. 08C-05-031 (JTV)
Plaintiff,	)	
	)	
v.	)	
	)	
JOANNE KINGSLAND,	)	
	)	
Defendant.	)	

CHRISTINA CONNELLY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DONALD B. BROWN, JR.,	)	
	)	
Defendant.	)	

Submitted: November 24, 2011
Decided: March 30, 2012

William D. Fletcher, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Plaintiff Connelly.

Matthew E. O'Byrne, Esq., Casarino, Christman, Shalk, Ransom & Doss, P.A., Wilmington, Delaware. Attorney for Defendant Kingsland.

Mary E. Sherlock, Esq., Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP, Dover, Delaware. Attorney for Defendant Brown.

Connelly v. Kingsland
Connelly v. Brown
C.A. No. 08C-05-031 (JTV)
March 30, 2012

Upon Consideration of Defendant Brown's Motion to Alter or Amend Judgment
DENIED

Defendant Brown's Motion For Relief From Judgment Under Rule 60(b)(1) and (6)
DENIED

Defendant Brown's Motion for Stay of Execution of Judgment Under Rule 62(b)
DENIED

Plaintiff's Motion for Pre-judgment Interest Pursuant to 6 Del. C. § 2301, Cost and Expert Witness Fees
GRANTED

VAUGHN, President Judge

OPINION

Before the Court are four motions which were filed after jury verdicts in favor of the plaintiff against each of two defendants in a joint trial. One is a Motion to Alter or Amend the Judgment filed by defendant Ronald B. Brown, Jr. That motion asks the Court to alter or amend the judgment against him by remittitur, or, in the alternative, for a new trial. A second motion filed by defendant Brown is a Motion for Relief from the Judgment under Rule 60 (b) (1) and (6). Defendant Brown's third motion is a Motion for Stay or Execution of the Judgment under Rule 62(b).

Connelly v. Kingsland
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The plaintiff, Christina Connelly, has filed a Motion for Prejudgment Interest Pursuant to 6 *Del. C.* § 2301, For Assessment of Expert Witness Fees Pursuant to 10 *Del. C.* § 8906, and for Court Costs Pursuant to Rule 54.

The case involved claims by one plaintiff, Christina Connelly, against two different defendants arising from two motor vehicle accidents. Both defendants admitted that they negligently caused some injury to the plaintiff. The issue before the jury was the nature and extent of the injury that each motor vehicle collision caused the plaintiff and the amount of damages to be awarded against each defendant. The jury returned a verdict against defendant JoAnne Kingsland of $67,726.01 and a verdict against defendant Brown of $224,271.41.

On May 26, 2006, the plaintiff was involved in the first motor vehicle accident with defendant Kingsland. The plaintiff was treated at the Christiana Hospital Emergency Room and released. She had follow-up treatment with Dr. Barry L. Bakst at Delaware Back Pain & Sports Rehabilitations. The treatment with Dr. Bakst's firm included physical therapy and chiropractic treatment. Dr. Bakst summarized his diagnosis after the May 26, 2006 accident as follows: cervical spine pain secondary to strain and sprain; with zygaphophyseal joint pain and a possible small right paracentral disc protrusion; somatic dysfunction of the cervical and lumbosacral spine area; myofascial type pain; lumbosacral spine pain secondary to strain and sprain with a possible small central disc protrusion; and muscle tension headaches.

On October 12, 2007, the plaintiff was a passenger in a vehicle that was

involved in a motor vehicle accident with defendant Brown. Dr. Bakst's impression of her condition after the second accident was that she suffered from chronic cervical spine pain, secondary to strain and sprain, chronic low back pain, secondary to strain and sprain, myofascial type pain, and active dysfunction involving the cervical dorsum in the sacral spine area. He testified that after the second accident she had swelling in her lower back and a lump which were new. He further testified that prior to the second accident, she suffered from chronic neck and low back pain and the second accident increased her pre-existing problems. He further testified that the plaintiff's injuries were directly related to both motor vehicle accidents. Dr. Bakst could not apportion the plaintiff's total injuries between the two accidents. Douglas Mormello, D.C. began treating the plaintiff after the second accident. He was also unable to apportion the injuries between the two accidents.

The plaintiff introduced into evidence her unpaid medical expenses proximately caused by each defendant. For the May 26, 2006 accident with defendant Kingsland, the unpaid medical expenses were $10,966.54. For the October 12, 2007 accident with defendant Brown, the unpaid medical expenses were $10,492.51.

I will first address the Motion for Relief from Judgment Under Rule 60(b)(1) and (6).

Defendant Brown's Motion for Relief from Judgment under Rule 60

The defendant contends that the award against him must be set aside as a matter of law pursuant to Rule 60(b)(1) because it must have involved a mistake. He

contends that there was no medical evidence or any other evidence to support an award against him of over three times the amount awarded for the first accident, and that there is no way to reconcile the disproportionate verdicts. He also points out that the plaintiff was seeking $10,492.51 against him for medical expenses, and that when this sum is subtracted from the whole award, the sum remaining for permanency and pain and suffering is $213,778.90. He contends that such a sum must have involved some mistake on the part of the jury. He also contends that the judgment should be set aside under Rule 60(b)(6) in order to accomplish justice.

In *Dixon v. Delaware Olds, Inc.*, the Delaware Supreme Court held that Rule 60(b) should not be used as a substitute for a motion for a new trial or an appeal from a judgment.[1] For this reason the Motion for Relief Under Rule 60 will be denied. I will, however, consider the grounds for this motion in my consideration of the Motion to Alter or Amend the Judgment.

Defendant Brown's Motion to Alter or Amend the Judgement

When reviewing a motion for a new trial, the jury's verdict is entitled to "enormous deference."[2] Traditionally, "the court's power to grant a new trial has been exercised cautiously and with extreme deference to the findings of the jury."[3] In the absence of exceptional circumstances, the validity of damages determined by

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[1] 405 A.2d 117, 118 (Del. 1979).

[2] *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997) (citing the Delaware Constitution, Art. IV, § 11(1)(a)).

[3] *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).

the jury should be presumed.[4] Even though a jury has great latitude, "it cannot totally ignore facts that are uncontroverted and against which no inference lies."[5] In *Storey v. Camper,*[6] the Delaware Supreme Court framed the grounds for awarding a new trial:

> [A] trial judge is only permitted to set aside a jury verdict when in his judgment it is at least against the great weight of the evidence. In other words, barring exceptional circumstances, a trial judge should not set aside a jury verdict on such ground unless, on a review of all the evidence, the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result.[7]

Similarly, a jury award that is challenged as excessive will not be disturbed unless it is clearly "the result of passion, prejudice, partiality or corruption."[8] Furthermore, in order for a motion for remittitur to be successful the verdict must be "manifestly the result of disregard of the evidence or applicable rules of law."[9] A jury verdict will not be set aside "unless it is so grossly excessive as to shock the Court's conscience and

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[4] *Littrel v. Hanby*, 1998 WL 109826 (Del. Super. Feb. 20 1998) (citing *Young*, 702 A.2d at 1236-37).

[5] *Haas v. Pendleton*, 272 A.2d 109, 110 (1970).

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

[7] *Id.* at 465.

[8] *Young ,* 702 A.2d at 1236.

[9] *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973).

sense of justice."[10]

I summarize the parties' contentions with regard to the Motion to Alter or Amend the Judgment as follows:

Defendant Brown contends that this is a case where the jury's award constitutes manifest injustice and should shock the conscience of the court; that based upon the evidence of the nature and extent of injury caused by each accident, the verdict against him is out of proportion with the verdict against defendant Kingsland; that the plaintiff did not sustain distinct, separate injuries from the two accidents; that the medical experts could not assess or quantify the degree of permanency from each accident; that there was no medical evidence, testimony, or facts to suggest that the plaintiff's total injuries were more than three times attributable to the second accident, as the verdicts suggest; that the injuries from the two accidents were similar, or even arguably identical; that the two verdicts should be substantially the same; that the only logical conclusion is that the jury's verdict against him was the result of passion, prejudice and sympathy; and that his absence at trial contributed to the jury's disregarding the Court's instruction that the jury not permit its verdict to be influenced by sympathy.[11]

The plaintiff contends that defendant Brown's contentions and his references to parts of the evidence do not meet the heavy burden required for altering or amending a jury verdict or granting a new trial. She also contends the evidence

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[10] *Id.*

[11] Defendant Brown did not appear at trial or otherwise participate in the proceedings.

established that she was a healthy, active person with no pre-existing injuries before the first injury; that she had to undergo 196 health care treatment sessions over five years from both accidents; that she is still treating with her physician and chiropractor; that she continues to experience limitations in her professional, social and personal life; that her injuries and limitations are permanent while her life expectancy is an additional 57 years; and that taking all of the evidence into account, the combined two verdicts are not grossly excessive so as to shock the Court's conscience for her total injuries. She also contends that after the first accident she was making progress in her recovery and by August 2007 was no longer receiving scheduled medical treatment of any type; that the second accident caused immediate and severe aggravation of her symptoms; that in October 2007 after the second accident Dr. Bakst found "noted increased neck and low back pain, as well as dorsal spine pain . . . She stated initially that she could not get out of the car and had difficulty moving;" that Dr. Bakst and Dr. Mormello both noted significant aggravation of her injuries as a result of the second accident and the need for medical treatment because of that aggravation; that 134 of her health care treatments came after the second accident; that both defendants accepted the risk of how the jury might allocate responsibility; and that the evidence permits and supports a finding that the second accident caused significant aggravation to her back problems and caused new injuries, particularly to her low back and pelvic regions.

Defendant Brown recognizes the perils of comparing a jury verdict in one case

with a jury verdict in another case.[12] In this case, however, he contends that reluctance to compare jury verdicts should not apply because the two verdicts involved were awarded by the same jury.

The plaintiff contends that comparison to other cases can be beneficial in certain circumstances when the cases are truly similar in nature. She offers the case of *Stallsworth v. K Mart Corp.*[13] for comparison, contending that it has significant similarity to this case. In *Stallsworth*, a Kent County jury awarded the plaintiff $275,306 for personal injuries he sustained in a slip and fall.[14] The court there found that although his permanencies did not prevent him from working, he nevertheless dealt with pain on a daily basis.[15] The court found it was the "jury's duty within their common experience to place a value on [the plaintiff's] suffering and permanency."[16]

I am not persuaded, however, that significant weight should be given to *Stallsworth.* As case law indicates, comparing jury verdicts, even where injuries are similar, can lead to unsound results.[17]

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[12] *Payne v. Home Depot,* 2009 WL 659073 (Del. Super. Mar. 12, 2009) (citing *Bounds v. Delmarva Power & Light Co.,* 2004 WL 343982, at *8 (Del. Super. Jan. 29, 2004).

[13] 1988 WL 139898, *1 (Del. Super. Nov. 3, 1988).

[14] *Id.*

[15] *Id.*

[16] *Id.* at *3.

[17] *Id.; see Bounds v. Delmarva Power & Light Co.,* 2004 WL 343982, *4 (Del. Super. Jan. 29, 2004); *see also Berl v. Cyrus Trding Corp.,* 1998 WL 109855, *3 (Del. Super. Feb. 19, 1998).

No authority is cited for comparing two verdicts rendered by the same jury, but even if the amount of the Kingsland verdict is taken into consideration in evaluating defendant Brown's contentions regarding the verdict against him, I conclude that the motion for remittitur or a new trial should be denied. The jury could infer from the evidence that the plaintiff was making progress in her recovery from the first accident. There was evidence that within weeks after the first accident her pain was intermittent and she was making improvement. Prior to the second accident Dr. Bakst had ended active chiropractic treatment, therapy or other treatment, and placed her on a home exercise program with medications. Therefore, the jury could infer that

the injuries from the second accident caused the need for all the medical treatment which occurred after that accident. There was evidence of new injury from the second accident, consisting of a new back condition with a lump in the plaintiff's lower back. Dr. Mormello, who treated her only after the second accident, continued to treat her until at least June of 2011, and testified in his deposition testimony, which was taken that month, that she would have a need for continuing chiropractic or physical therapy treatments. Therefore, the jury could conclude that she is still in need of chiropractic or physical therapy, whether she receives such therapy or not, and, as mentioned, that such need was caused be the second accident. He testified that as of March 2011, three and one-half years after the second accident, the lump which is apparently associated only with the second accident was very bothersome to her.

When the testimony of Dr. Bakst and Dr. Mormello is taken as a whole, I am satisfied that the jury could properly have concluded that the aggravation of the plaintiff's pre-existing injuries caused by the second accident was significant, and that the aggravation and the new injury from the second accident significantly worsened her medical condition.

I am also not persuaded by the fact that subtracting the medical expenses from the verdict leaves an un-rounded sum leads to a conclusion that the jury made a mistake or that there is any other reason justifying relief from the operation of the judgment.

I conclude that the standard for remittitur or a new trial is not met.

Defendant Brown's Motion for Stay

Since Defendant Brown's Motions to Alter or Amend the Judgment and For Relief Under Rule 60 are being denied, the Motion for Stay will be denied.

Plaintiff's Motion for Prejudgment Interest, Expert Witness Fees, and Court Costs

The plaintiff moves for prejudgment interest against both defendants pursuant to 6 *Del. C.* § 2301(d). The statute reads in pertinent part as follows:

> In any tort action for compensatory damages in the Superior Court . . . seeking monetary relief for bodily injuries . . . interest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing from the date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement

> demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered. [18]

The defendants contend that prejudgment interest should be denied because the plaintiff did not request such interest in her pleadings or raise the issue at trial. In the alternative, the defendants contend that the amount of prejudgment interest should be reduced due to certain delays in the trial allegedly cause by the plaintiff or otherwise not caused by the defendants. I reject both such contentions. The statute is clear, unambiguous and without qualification. There is no requirement that the plaintiff include a request for prejudgment interest in her pleadings or raise the issue at trial, and there is no exception for periods of delay or perceived delay during the litigation. The statute provides that prejudgment interest "shall" be added when, prior to trial, a plaintiff in a tort action for personal injuries makes a written settlement demand, valid for a minimum of 30 days, in an amount less than the amount of the damages upon which judgment was entered. Written settlement demands satisfying the requirements of the statute were made upon both defendants. I adopt the calculations performed by the plaintiff and award her $40,412.85 in prejudgment interest against Defendant Kingsland and $92,958.96 against defendant Brown.[19]

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[18] 6 *Del. C.* § 2301(d).

[19] The defendants rely, in part, upon *Payne v. The Home Depot*, 2009 WL 924515, *1 (Del. Super. Apr. 7, 2009). To the extent that *Payne* holds that a plaintiff must request an award of prejudgment interest in his or her pleadings or raise the issue at trial, I decline to follow it. Prejudgment interest is a litigation expense, not an element of damages. *State v. Enrique*, 16

The final issue is whether or not the court costs and expert witness fees should be awarded against defendant Brown.[20] The amounts the plaintiff seeks to have fixed as Court costs in the matter are as follows:

(1) Court Filing Fees	$1,298.18
(2) Trial fee	150.00
(3) Sheriff (Service Fee)	240.00
(4) Wilcox & Fetzer	504.10
(5) Dr. Barry Bakst, M.D.	2,175.00
(6) Discovery Video Services	618.00
TOTAL:	$5,435.28

Defendant Brown contends that of the total of $1,688.18 in court filing fees, trial fee and sheriff service fee, the plaintiff provides no breakdown as to what part was incurred in the Kingsland case and what part was incurred in his case; that he should not be assessed court costs for the lawsuit against Kingsland; and that he should be assessed only one-half of the expert witness fees. He asks the court to award the sum of $2,717.64, or one-half of the court costs and expert witness fees.

The plaintiff contends that the amount of court costs which she seeks are directly related to the suit against Defendant Brown and do not include any amount for the claim against defendant Kingsland prior to the consolidation of the two cases. She further contends that if the two cases had never been consolidated, the expert

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A.3d 938 (Del. 2011).

[20] The plaintiff sought no court costs or expert witness fees against defendant Kingsland because she is not a resident of Kent County. 10 *Del. C.* § 5102.

medical testimony presented would have been the same in a case against defendant Brown alone as it was in the consolidated case.

As to the expert witness fees, I agree with the plaintiff. As to the court costs, for the sake of finality I am inclined to accept the representation of plaintiff's counsel that he has separated out and excluded costs associated with the Kingsland suit before consolidation. Therefore, I will award court costs and expert witness fees in the amount of $5,435.28 as sought by plaintiff.

For the foregoing reasons, the Motion to Alter or Amend the Judgment, the Motion for Relief Under Rule 60, and the Motion for Stay are **denied**. The Motion for Prejudgment Interest, Court Costs and Expert Witness Fees is **granted**.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary
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