SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Cynthia H. Pruitt, Esquire
Doroshow, Pasquale, Krawitz & Bhaya
1208 Kirkwood Highway
Wilmington, Delaware 19805
Attorney for Plaintiff Ruth Streetie

Christian G. Heesters, Esquire
Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP
1220 North Market Street
Suite 300
Wilmington, Delaware 19801
Attorney for Defendant Progressive Classic Insurance Company

Re: Ruth Streetie v. Progressive Classic Insurance Company
C.A. No. 09C-06-103 RRC

Submitted: January 24, 2011
Decided: April 4, 2011

On Plaintiff Ruth Streetie's Motion for a New Trial.
DENIED.

On Defendant Progressive Classic Insurance Company's Motion to Amend Judgment.
GRANTED.

On Defendant Progressive Classic Insurance Company's Motion for Costs.
GRANTED.

Dear Counsel:

INTRODUCTION

Plaintiff Ruth Streetie ("Plaintiff") was involved in a motor vehicle accident in July 2006. After settling with the tortfeasor for the tortfeasor's $25,000 policy limit, Plaintiff instituted the instant Underinsured Motorist ("UIM") action against her own insurer, Defendant Progressive Classic Insurance Company ("Defendant"). Following a jury verdict awarding Plaintiff $9,179 in damages, Plaintiff moved for a new trial on the ground that the jury awarded no damages for pain and suffering, thereby rendering the verdict inadequate as a matter of law. Plaintiff bases this assertion on the fact that the jury's award exactly mirrored the medical expenses incurred between the exhaustion of Plaintiff's PIP benefits from the instant accident and the date that Plaintiff was involved in a subsequent accident.

The resolution of Plaintiff's motion for a new trial implicates an issue of apparent first impression for this Court. Specifically, Plaintiff's motion requires this Court to review the adequacy of a jury verdict which allegedly failed to award noneconomic damages in the context of the unique nature of a UIM claim; by definition, a UIM claim is preceded by a plaintiff's exhaustion of all available proceeds from a tortfeasor's insurance carrier. Given that the jury in a UIM case is generally informed of the claim's status as one against the plaintiff's own insurance carrier for UIM benefits, the Court must determine the extent to which, if any, the jury's putative knowledge of a plaintiff's recovery from a tortfeasor motorist is properly considered by a jury when reaching its verdict as to the amount of Plaintiff's damages.

At the same time, Defendant Progressive Classic Insurance Company ("Defendant") moves to amend the judgment to reflect the $25,000 payment that Plaintiff received from the tortfeasor's liability insurer. Such an amendment would reduce the judgment to $0, given the jury's verdict of $9,179.[1]

Upon review of the facts, the law, and the parties' submissions, Plaintiff's motion for a new trial is **DENIED**. Consequently, given the jury's verdict, Defendant's Motion to Amend Judgment is **GRANTED.** Finally,

[1] This motion is effectively unopposed, as the parties' Pretrial Stipulation confirms that Plaintiff was seeking to recover for damages over and above the $25,000 received from the tortfeasor.

Defendant's Motion for Costs pursuant to Superior Court Civil Rule 54(d) is **GRANTED.**

FACTS AND PROCEDURAL HISTORY

The underlying facts of Plaintiff's instant motor vehicle accident are essentially undisputed; instead, the parties' dispute centers on the extent to which Plaintiff's injuries were caused by the this accident. As indicated in the Pretrial Stipulation filed by the parties, Plaintiff was rear-ended on July 5, 2006.[2] Plaintiff alleged that, as a result of this accident, she suffered neck injuries requiring a two-level cervical fusion.[3] Conversely, Defendant asserted that Plaintiff's surgery was not necessary, and, alternatively, that Plaintiff's surgery was not related to the July 2006 accident;[4] the issue of causation is particularly significant given that Plaintiff sustained a subsequent neck injury in a motor vehicle accident of November 14, 2008.[5] It was undisputed that Plaintiff had a UIM policy with Defendant at the time of the July 2006 accident, that Plaintiff was not at fault for that accident, and that medical expenses totaled $99,371.11.[6] Defendant disputes the extent to which the July 2006 accident was the cause of the foregoing medical expenses; accordingly, the trial was effectively limited to the issue of causation.[7]

Kennedy Yalamanchili, M.D., a neurosurgeon, served as Plaintiff's expert witness, and Errol Ger, M.D., an orthopedic surgeon, served as Defendant's expert witness.[8] During trial, Dr. Yalamanchili testified that Plaintiff's need for cervical surgery was caused by the instant accident;[9] however, on cross-examination, Dr. Yalamanchili also testified that Plaintiff did not inform him that she had been involved in another motor vehicle accident in 2008.[10] Further, Dr. Yalamanchili testified that, at the time he opined that Plaintiff's neck surgery was directly related to the instant accident, he had not had an opportunity to review Plaintiff's prior medical

[2] Pretrial Stipulation of Oct. 22, 2010 at 1 (Lexis Transaction I.D. 33993453).
[3] *Id.*
[4] *Id.* at 2.
[5] Def.'s Br. in Support of Opp'n. to Pltf.'s Mot. for New Trial at 3.
[6] Pretrial Stipulation of Oct. 22, 2010 at 3 (Lexis Transaction I.D. 33993453).
[7] *Id.*
[8] *Id.* at 6-7.
[9] Def.'s Br. in Support of Opp'n. to Pltf.'s Mot. for New Trial Ex. A; Transcript of Videotaped Deposition of Kennedy Yalamanchili, M.D. of Nov. 10, 2010 at 49.
[10] *Id.* at 70.

records;[11] indeed, Dr. Yalamanchili testified that he had not reviewed a medical record from less than two months prior to the instant accident, a record which indicates that Plaintiff had recently undergone cervical X-Rays, and her pain had intensified to the point that a prescription for an anti-inflammatory drug was issued.[12] In contrast to Dr. Yalamanchili, Defendant's expert, Dr. Ger, testified that Plaintiff may have been injured in the instant accident via an exacerbation of her pre-existing condition, but the only evidence of such exacerbation was Plaintiff's subjective complaints.[13]

The jury found that the July 5, 2006 motor vehicle accident was not the proximate cause of Plaintiff's surgery.[14] The jury awarded Plaintiff the "single sum" of $9,179 to compensate her for the injuries it found to be caused by the July 2006 accident.[15]

CONTENTIONS OF THE PARTIES

Plaintiff moves for a new trial, pursuant to Superior Court Civil Rule 59(a), on the ground that the jury failed to fully compensate Plaintiff for her injuries.[16] Plaintiff notes that the jury's award of $9,179 is the exact amount of medical expenses incurred between July 5, 2008, when Plaintiff's statutory Personal Injury Protection benefits ["PIP"] covering the instant accident expired, and November 14, 2008, when Plaintiff was involved in another motor vehicle accident.[17] Plaintiff argues that "there are no alternative explanations to. . .the jury's award of damages other than it was an award for certain medical expenses without any compensation for pain and suffering."[18] Plaintiff contends that the amount of the jury's award indicates that the jury failed to follow the Court's instructions.[19]

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[11] *Id.* at 75.
[12] *Id.* at 85-88.
[13] Def.'s Br. in Support of Opp'n. to Pltf.'s Mot. for New Trial Ex. B; Transcript of Videotaped Deposition of Errol Ger, M.D. of Nov. 1, 2010 at 45-46.
[14] Verdict Sheet (Lexis Transaction I.D. 34406461).
[15] *Id.*
[16] Pltf.'s Mot. For New Trial at 2.
[17] *Id.* at 1.
[18] *Id.* at 3. *See also* Pltf.'s Reply Br. at 7 ("There are no alternative explanations to explain the jury's award of damages other than it was an award for certain calculated medical expenses, and therefore, without compensation for pain and suffering. The jury compensated the plaintiff 'to the penny' for the medical bills that it found were proximately related to the July 5, 2006 accident.") (citation omitted).
[19] *Id.*

Plaintiff asserts that a note from the jury asking, *inter alia*, "if [the jury] award[s] partial amount will [Plaintiff] have to pay health insurance that money or will it be hers to keep [?]" confirms that the jury "failed to understand their duty to fully compensate" Plaintiff.[20] Plaintiff has cited Delaware cases to support the proposition that a jury award which mirrors the medical expenses necessarily fails to adequately compensate the plaintiff for pain and suffering; according to Plaintiff, "a jury award that compensates for medical expenses but fails to award pain and suffering damages is grossly inadequate as a matter of law."[21] Further, Plaintiff contends that "Delaware case law [on the issue of the adequacy of a jury verdict] does not distinguish cases where there is a dispute as to whether the injuries resulted from the accident" and "[c]ausation of the injuries has no relevance to the reasoning of Delaware courts that an award for medical expenses necessarily implies pain and suffering."[22]

Finally, with regard to Defendant's assertion that this Court's review of the adequacy of a jury's verdict in a UIM case should defer to the possibility that the jury inferred that the plaintiff was adequately compensated by the tortfeasor, Plaintiff submits that general tort law applies to UIM cases.[23] That is, Plaintiff argues that the Court's review of the adequacy of the jury's verdict should be guided by Delaware jurisprudence on the adequacy of jury verdicts in general, rather than a standard of review unique to UIM cases.[24]

Defendant's response is twofold: 1) even if the jury's award was only for Plaintiff's medical expenses, Plaintiff is not entitled to a new trial because the trial evidence provided a reasonable basis for jury to conclude that Plaintiff was already sufficiently compensated for pain and suffering; and 2) Plaintiff is not entitled to a new trial because the trial evidence did not conclusively prove that Plaintiff suffered an injury worthy of any compensation in addition to that already received from the tortfeasor.[25] Specifically, Defendant contends that "the jury likely concluded that any pain and suffering experienced by plaintiff as a result of the 2006 accident was minimal and; therefore, she was adequately compensated for any such pain

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[20] Pltf.'s Mot. For New Trial at 2.
[21] *Id.* at 2.
[22] Pltf.'s Reply Br. at 12.
[23] *Id.* at 8-9.
[24] *Id.*
[25] Def.'s Br. in Support of Opp'n. to Pltf.'s Mot. for New Trial at 6-9.

and suffering out of her recovery from the tortfeasor."[26] Defendant argues that Plaintiff's belief that she was not fully compensated by the jury's award is not necessarily an indication that the jury was confused about its duty to compensate her for her injuries.[27] Defendant notes that the jury was aware that Plaintiff received maximum amount recoverable from the tortfeasor's insurance; Defendant contends that this awareness of Plaintiff's recovery from the tortfeasor coupled with evidence at trial suggesting alternate causes of Plaintiff's injuries is a sufficient basis for the jury's verdict.[28]

With respect to Plaintiff's argument that a jury award that precisely matches the medical expenses necessarily fails to compensate for pain and suffering, Defendant argues that the cases relied on by Plaintiff are inapposite.[29] According to Defendant, the cases cited by Plaintiff either involved injuries with undisputed causation, whereas in this case the jury's verdict turned on whether and to what extent Plaintiff's injuries were caused by the July 5, 2006 accident,[30] or the cases cited by Plaintiff involved an action to recover against a tortfeasor, rather than a UIM action.[31]

Defendant submits that "it appears to be an issue of first impression in Delaware whether [, in a UIM case,] a jury award for special damages only. . .could be a basis for granting a new trial."[32] Defendant cites to Florida case law to support the position that, in a UIM case (as opposed to a tort claim), a verdict for special damages only does not necessitate the granting of a new trial.[33]

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[26] *Id.* at 7.
[27] *Id.*
[28] *Id.* at 8. Alternatively, Defendant argues that *additur*, rather than a new trial, is the appropriate remedy for the jury's alleged error. *Id.* Plaintiff contends that *additur* is not an appropriate remedy in this case. Pltf.'s Reply Br. at 13 ("[A]dditur would not be appropriate in this case, because the medical bills that were awarded by the jury followed two years of treatment. Therefore, in granting additur, the Court would be taking the place of the jury in determining an additur amount and fully compensating the plaintiff for her injuries-in effect, becoming a bench trial.").
Def.'s Br. in Support of Opp'n. to Pltf.'s Mot. for New Trial at 6-9.
[30] Notably, the jury found no causal relationship between the instant accident and Plaintiff's cervical surgery. *See* Verdict Sheet (Lexis Transaction I.D. 34406461).
[31] Def.'s Br. in Support of Opp'n. to Pltf.'s Mot. for New Trial at 10-11.
[32] *Id.* at 11.
[33] *Id.* (citing *Somoza v. Allstate Ins. Co.*, 929 So.2d 702 (Fla. Dist. Ct. App. 2006).

In essence, Defendant maintains that a new trial is not warranted because, under Delaware law, a new trial should not be granted simply because the jury awards no damages for pain and suffering when the sole basis for the medical expert's opinion is the plaintiff's subjective complaints.[34] Defendant asserts that the evidence of Plaintiff's injury and its cause was limited to the testimony of Dr. Yalamanchili and Plaintiff herself; according to Defendant, Dr. Yalamanchili's opinion was partially based on Plaintiff's inaccurate representation that she had had no neck problems prior to the accident.[35] Likewise, Defendant notes that its expert, Dr. Ger, opined that Plaintiff may have sustained a "flare up" of her preexisting condition due to the instant accident, but the sole basis of this opinion was Plaintiff's subjective complaints.[36]

STANDARD OF REVIEW

A. Motion for New Trial Pursuant to Superior Court Civil Rule 59(a).

A party's motion for a new trial is controlled by Superior Court Civil Rule 59, which provides, in relevant part, as follows:

> A new trial may be granted as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court.[37]

When reviewing a motion for a new trial, the Court's baseline presumption is that the jury's verdict was correct.[38] Accordingly, "[b]arring exceptional circumstances, the trial judge should set aside a jury verdict pursuant to a Rule 59 motion only when the verdict is manifestly and palpably against the weight of the evidence, or for some reason, justice

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[34] *Id.* at 13.
[35] *Id.* at 9.
[36] *Id.*
[37] Super. Ct. Civ. R. 59(a).
[38] *See, e.g.*, *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979) ("When the motion for a new trial solely on weight of the evidence grounds is denied in a jury case, this Court on appeal is bound by the jury verdict if it is supported by evidence.") (citations omitted); *Smith v. Lawson*, 2006 WL 258310 (Del. Super. Ct. 2006) ("Every analysis of a motion for a new trial must begin with the presumption that the jury verdict is correct.").

would miscarry if the verdict were allowed to stand."[39] Put another way, a jury's verdict will only be set aside if "it is clear that the award is so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice. . ."[40] This standard applies to both verdicts which are alleged to be excessively high and which are alleged to be excessively low.[41]

B. Motion to Amend Judgment Pursuant to Superior Court Civil Rule 59(d).

Under 18 Del. C. § 3902(b)(3), an insurer "shall not be obligated to make any payment under this coverage until after the limits of liability under all bodily injury bodily bonds and insurance polices available to the insured at the time of the accident have been exhausted by payment of settlement or judgments." The Supreme Court of Delaware has interpreted the reduction permitted by § 3902(b)(3) to apply to the total amount of a plaintiff's damages, rather than policy limits of a plaintiff's UIM coverage. [42] That is, a UIM carrier may offset the amounts paid to the plaintiff by the tortfeasor from the amount of the plaintiff's damages, rather than from the total amount of UIM coverage available under the policy. The underlying purpose of this offset is to prevent double recovery by a plaintiff.[43]

Under the facts of this case, the Court's review of Defendant's motion to amend judgment is particularly streamlined. Plaintiff received the policy limit of $25,000 from the tortfeasor's liability insurer, and the jury determined Plaintiff's damages to be $9,179.[44] Thus, the UIM coverage

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[39] *Burgos v. Hickok*, 695 A.2d 1141, 1145 (Del. 1997) (citation omitted).
[40] *Mills v. Telenczak*, 345 A.2d 424, 426 (Del. 1975)
[41] *Id.*
[42] *See Nationwide Mut. Auto. Ins. Co. v. Peebles*, 688 A.2d 1374, 1378 (Del. 1997) ("Accordingly, we hold that Section 3902(b) mandates that any reduction provided for by Section 3902(b)(3) must be deducted from the total amount of the insured claimant's bodily injuries and not from the limits of the insured claimant's underinsurance coverage.").
[43] *See Walls v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 2006567, *3 (Del. Super. Ct. 2010) ("The Court will note, however, that the cases interpreting and applying Section 3902(b)(3) make clear that the statute's purpose is to prevent double coverage (and double recoveries), and that the focus with respect to set-off is on the amount actually received from the tortfeasor as compensation for 'bodily injury,' not the policy limits.") (citing *Peebles*, 688 A.2d at 1378).
[44] Def's. Mot. to Amend J. of Dec. 6, 2010 at 1.

limits are irrelevant in this case;[45] when calculating the appropriate setoff, it is immediately apparent that Plaintiff's recovery from the tortfeasor's insurer was significantly more than Plaintiff's damages, as determined by the jury.[46] Further, in the Pretrial Stipulation, Plaintiff explicitly stated that she sought damages "in excess of the amount received from the tortfeasor."[47] Consequently, Defendant's Motion to Amend Judgment is essentially unopposed, and the verdict is properly be amended to $0.

C. Motion for Costs Pursuant to Superior Court Civil Rules 54(d) and 68.

Superior Court Civil Rule 54(d) is the general provision pertaining to an award of costs. The rule states:

> Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs.

The Supreme Court of Delaware has explained that it is the award of a judgment that "determines the purely legal question of who is the prevailing party for purposes of an award of costs under Rule 54(d)."[48]

Superior Court Civil Rule 68 sets forth the procedure and effect of an offer for judgment. In relevant part, the rule provides "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."

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[45] Under the instant policy, Plaintiff's UIM coverage limits are $100,000. *Id.*

[46] Specifically, the subtraction of Plaintiff's $25,000 recovery from the tortfeasor's insurance carrier from the jury's award of $9,179 discloses that Plaintiff received $15,821 more than what her damages were ultimately found to be.

[47] Pretrial Stipulation of Oct. 22, 2010 at 2 (Lexis Transaction I.D. 33993453).

[48] *Graham v. Keene Corp.*, 616 A.2d 827, 828 (Del. 1992).

DISCUSSION

A. The Standard of Review on a Motion for a New Trial is the Same in Both UIM and Traditional Tort Cases.

This Court rejects Defendant's assertion that the adequacy of a jury verdict in a UIM case is reviewed differently than the adequacy of a jury verdict in a general tort case. Although this is an issue of apparent first impression in Delaware, this Court, guided by existing Delaware law, holds that the adequacy of a jury's verdict in a UIM case should be reviewed by the same standard as the adequacy of a jury's verdict in a traditional tort case.

As a threshold matter, this Court must determine if evaluating the adequacy of verdict in a UIM case requires an analysis which differs from that used when evaluating verdicts in standard tort cases. A UIM claim is unique in that the plaintiff's claim is against the plaintiff's own insurance carrier after sustaining an injury caused by an underinsured tortfeasor and recovering the insurance proceeds available from the tortfeasor's liability insurance coverage. Thus, the plaintiff's insurance carrier is responsible to the plaintiff only to the extent which the tortfeasor, had he or she been adequately insured, would have been responsible to the plaintiff.

The characteristics of UIM coverage are succinctly described in *Automobile Injury and Insurance Claims: Delaware Law and Practice*, which states:

> Typically, without uninsured/underinsured coverage if a tortfeasor was uninsured (which has become more common), a party injured by an uninsured motorist would not receive compensation. In addition, it appeared that the minimum limits of $15,000 (initially $10,000) was inadequate to compensate for substantial damages. If a tortfeasor had the minimum limits of insurance of $15,000, an injured party would often find any excess value of his or her case to be uncollectible. . . .
>
> For underinsured motorist coverage, in its simplistic form, if a party suffered damages of $30,000, but the tortfeasor had the minimum limits of $15,000, the injured party would collect $15,000 from the tortfeasor and his carrier, and $15,000 from the injured party's own underinsured motorist carrier.

> Uninsured/underinsured motorist coverages are not "no fault" concepts as may be found in the personal injury protection provisions. Uninsured/Underinsured coverage is founded on fault, and an injured party is entitled to obtain uninsured/underinsured benefits, only if a tortfeasor would be liable to that party.[49]

The jury in this case was informed that the case was one for UIM benefits; moreover, the agreed-upon jury instructions explicitly stated that "the plaintiff, Ruth Streetie, is suing her insurance company, the defendant, Progressive Classic Insurance Company, for damages under her underinsured motorist policy with the defendant."[50] Given this awareness, the jury undoubtedly recognized that Plaintiff had already recovered at least some measure of damages from the tortfeasor, as such a recovery is a necessary predicate to a UIM claim. However, the jury was not told the amount of Plaintiff's recovery from the tortfeasor. Further, the jury was instructed that, if it found for Plaintiff, it must award damages which provide "1) compensation for pain and suffering [Plaintiff] has suffered to date; [and] 2) compensation for reasonable and medical necessary expenses to date."[51] Significantly, the jury was not instructed not to consider the fact of Plaintiff's recovery from the tortfeasor in determining the amount of damages that would fully compensate Plaintiff.

Defendant argues that, because a UIM case is, by definition, a claim seeking compensation in addition to the recovery already received from a tortfeasor, the jury could "quite reasonably" conclude that Plaintiff was already sufficiently compensated for the 2006 accident.[52] As stated, the specific issue of whether a jury's apparent failure to make an award for noneconomic damages in a UIM case forms a basis for a new trial has not been addressed in Delaware. Consequently, Defendant relies upon a Florida case, *Somoza v. Allstate Indemnity Co.*,[53] to support its contention that, in a UIM case, the jury's failure to award damages for pain and suffering does not provide grounds for a new trial.[54]

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[49] ROBERT K. BESTE, JR. & ROBERT KARL BESTE, III, AUTOMOBILE AND INSURANCE CLAIMS: DELAWARE LAW AND PRACTICE 109 (2003).
[50] Jury Instructions at 4.
[51] *Id.* at 10.
[52] Def.'s Br. in Support of Opp'n to Pltf.'s Mot. for New Trial at 6-7.
[53] 929 So.2d 702 (Fla. Dist. Ct. App. 2006).
[54] Def.'s Br. in Support of Opp'n. to Pltf.'s Mot. for New Trial at 11.

Somoza was decided by the District Court of Appeal of Florida, an intermediate court of appeals.[55] In *Somoza*, the plaintiff was injured in a motor vehicle accident and received the $10,000 liability policy limit from the tortfeasor.[56] The plaintiff then pursued UIM benefits from her insurance carrier; after trial, the jury awarded $20,350 for past medical expenses, nothing for future medical expenses, and $2,000 for loss of past earnings.[57] However, the jury found that the plaintiff did not suffer a permanent injury, and consequently made no award for pain and suffering.[58] The plaintiff appealed the jury's verdict, asserting that the jury's failure to award damages for pain and suffering required a new trial; the District Court of Appeal held as follows:

> At trial, [the plaintiff] introduced evidence that she suffered permanent injuries due to the accident. [The insurer's] experts testified that [the plaintiff's] injuries were preexisting or occurred after the accident and were not caused by the accident. The jury found that [the plaintiff] suffered no permanent injuries as a result of the accident. The record contains competent substantial evidence to support the jury's verdict. As [the plaintiff] failed to meet the threshold requirement of demonstrating that she suffered permanent injury as a result of the accident, the award of no damages for [the plaintiff's] pain and suffering is not erroneous.[59]

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[55] *Somoza*, 929 So.2d at 702. There is no indication that *Somoza* was appealed to the Supreme Court of Florida.

[56] *Id.* at 703.

[57] *Id.* at 703-04.

[58] *Id.* at 704.

[59] *Id.* at 705. Plaintiff argues that Florida law does not require a new trial when a jury awards medical expenses only, although there is such a requirement in Delaware; according to Plaintiff, this distinction undermines *Somoza*'s relevance to this case. Pltf.'s Reply Br. at 11-12 (citing *DiGoia v. Schetrompf*, 251 A.2d 569, 571 (Del. Super. Ct. 1969) ("In the case at [b]ar, accepting the jury's verdict as to the medical specials and loss of wages and viewing the balance of evidence most favorably for the defendant, I find as a matter of law that the plaintiff [] necessarily provided some pain and suffering in more than a nominal amount."); *Fowler v. Raksnis*, 1997 WL 720718, *2 ("I am of the opinion that an [a]dditur is appropriate in this case and it should be in an amount which gives the defendant every reasonable factual inference and which reflects what verdict the record justifies as an absolute minimum.")). However, and as discussed *infra*, there is no *per se* rule in Delaware that an award which precisely mirrors a plaintiff's medical expenses necessitates a new trial or *additur*; indeed, the very cases cited by Plaintiff to support such a contention disclose that the Court considered each jury verdict in the context of its specific facts. Nonetheless, it is true that Florida law on this issue is distinguishable from Delaware law in that, under Florida law, a plaintiff in a motor

This Court does not agree with Defendant's separate contention that the adequacy of a verdict in a UIM case is reviewed differently than the adequacy of a verdict in a general tort case. While this precise question has not been previously decided in Delaware, the issue is nonetheless controlled by principles articulated in recent jurisprudence from the Supreme Court of Delaware.[60]

Although a UIM claim arises from a tortfeasor's liability to Plaintiff, such claim is essentially a claim under a contract (that is, a plaintiff's contract with an insurer).[61] However, the Supreme Court of Delaware has also recently held that, in a UIM case, tort law applies to the proceedings which "result from the accident."[62] In *Rapposelli v. State Farm Mutual Auto Insurance Co.*, the Supreme Court stated as follows:

> Our precedent charts a circuitous, but consistent and equitable path: tort law applies to proceedings that result from the accident, and contract law governs only those aspects of the underinsured motorist claim that are not controlled by the resolution of facts arising from the accident. We could determine this occasionally narrow distinction by considering whether the determination of fault and the extent of damages arising from the accident affects resolution of the parties' disputed issue. For example, parties could resolve the existence of coverage or the length of the statute of limitations before or without knowledge of the accident. On the other hand, damages and fault require knowledge of the accident

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vehicle accident case must prove a permanent injury as a prerequisite to recovering noneconomic damages. *See*, *e.g.*, *Geico Gen. Ins. Co. v. Cirillo-Meijer*, 50 So.3d 681, 684 (Fla. Dist. Ct. App. 2010). ("In the instant case, by granting a directed verdict in favor of the UM insurer on the permanency threshold, the trial court resolved the issue of non-economic damages, finding, as a matter of law, that the plaintiff was not entitled to the same."). However, this distinction is irrelevant for purposes of the instant motion because this Court rejects Defendant's proffered interpretation of *Somoza*.

[60] Also, the Court notes that the *Somoza* case does not stand for the broad proposition that, under Florida law, jury verdicts in UIM cases are reviewed differently than jury verdicts in general tort cases; rather, *Somoza* simply held that the failure to award noneconomic damages did not necessitate a new trial when there was evidence of the plaintiff's preexisting injury and a lack of causation of the injury in dispute. *Somoza*, 929 So.2d at 705. Thus, although *Somoza* arose in the context of a UIM claim, this procedural posture did not control the Florida District Court of Appeal's analysis.

[61] *See, e.g.*, *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1287 (Del. 1982) ("We conclude that an action by an insured against [his or her] automobile insurance carrier to recover uninsured motorist benefits essentially sounds in contract rather than in tort.").

[62] *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 428-29 (Del. 2010).

> and its results. While the former set of issues constitutes a contract action, tort law governs the latter set.[63]

The Supreme Court was unequivocal in its proclamation that, in a UIM case, issues of "damages and fault" are governed by tort law.[64]

Also, in *Miller v. State Farm Mutual Auto Insurance Co.*, the Supreme Court recently concluded that the collateral source rule applies in UIM cases.[65] In *Miller*, the collateral source of the plaintiff's recovery was worker's compensation, rather than a tortfeasor's liability insurance carrier.[66] Nonetheless, the reasoning of *Miller* is illustrative in this case:

> The issue before us-whether the collateral source rule applies in the underinsured motorist context-is of first impression. We conclude that that issue must be answered in the affirmative. The collateral source-here, [the plaintiff's worker's compensation carrier]-had no connection to the defendant, State Farm. The State Farm insurance policy was purchased and paid for by [the plaintiff], whereas [the plaintiff's worker's compensation insurance] was paid for by his employer. Because State Farm contributed nothing to the fund that created the collateral source and had no interest in that fund, State Farm should not have been allowed to benefit from it. That [the plaintiff's] action is based upon a contract (the State Farm insurance policy), or that State Farm was not the actual tortfeasor, [does] not alter that conclusion. Under the underinsured motorist provision of the insurance contract between the [the plaintiff] and State Farm, State Farm was required to pay [the plaintiff] whatever damages that [the plaintiff] was "legally entitled to recover" from King. That is, State Farm's contractual obligation to pay the [the plaintiff] derived from [the tortfeasor's] liability in tort. Under the collateral source rule (which clearly applied to [the plaintiff's] separate claim against [the tortfeasor]), [the plaintiff's] entitlement to recover from [the tortfeasor] would not have been diminished by payments he received from a collateral source. Consequently, State Farm's derivative contractual obligation to [the plaintiff] should likewise have been unaffected by the collateral source payments.[67]

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[63] *Id.*
[64] *Id.* at 429.
[65] 993 A.2d 1049 (Del. 2010).
[66] *Id.* at 1053.
[67] *Id.* at 1053-54.

The collateral source rule is "firmly embedded" in Delaware.[68] The rule "prohibits the admission of evidence of an injured party receiving compensation or payments for tort-related injuries from a source other than the tortfeasor."[69] There are two rationales for the rule, as explained by the Supreme Court:

> [The collateral source rule] "is predicated upon the theory that a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person from sources unconnected with the defendant." However, another rationale behind the collateral source doctrine is a concern for prejudice that may result to an injured party in the minds of the jury from knowledge of any "double recovery."[70]

Of course, in *Miller*, the Supreme Court applied the collateral source rule to preclude evidence of the plaintiff's recovery from a worker's compensation carrier, obviously "a source other than the tortfeasor"[71] and within the scope of the collateral source rule; here, the terms of the collateral source rule are inapplicable because Plaintiff's recovery was from the tortfeasor. Consequently, collateral source rule jurisprudence is not necessarily dispositive.[72] Nonetheless, *Miller* is illustrative in that it reiterates Delaware's general policy of treating UIM claims comparably to general tort claims.

In the instant case, damages (specifically, the extent to which Plaintiff's damages were caused by the July 2006 accident) was the crux of the parties' dispute. Thus, given that "tort law governs"[73] the issue of damages in a UIM case, and given that tort law would preclude the introduction of evidence regarding Plaintiff's recovery from other sources, this Court concludes that the

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[68] *Id.* at 1053 (quoting *Yarrington v. Thornburg*, 58 Del. 152, 155 (Del. 1964)).
[69] *James v. Glazer*, 570 A.2d 1150, 1155 (Del. 1990)
[70] *Id.* (citations omitted).
[71] *Id.*
[72] *See generally* 25 C.J.S. *Damages* § 172 ("In the application of the collateral source doctrine or rule, a distinction is sometimes drawn between damages in tort and damages in contract. While there is authority that the collateral source doctrine is applicable only in tort and not contract actions, there is also authority that the doctrine is applicable in contract cases as well as in tort actions.") (citations omitted). Under Delaware law, the collateral source rule applies in actions under a contract. *See Miller*, 993 A.2d at 1054 ("That [the plaintiff's] action is based upon a contract (the [insurer's] policy). . . .do[es] not alter [the applicability of the collateral source rule].").
[73] *Rapposelli*, 988 A.2d at 428.

jury may not properly consider a plaintiff's recovery from the tortfeasor when determining damages in a UIM case.

Although Plaintiff's recovery from the tortfeasor is not within the language of the collateral source rule's prohibition on evidence of a recovery from sources "other than the tortfeasor,"[74] the harmonization of *Rapposelli* and *Miller* requires that the principles underlying the collateral source rule be applied in a UIM claim. Indeed, to hold otherwise would be duplicative with the setoff available to a UIM insurer under 18 Del. C. § 3902(b)(3); under 3902(b)(3), a UIM carrier may deduct the amount of other insurance coverage available to its insured from the total amount of the insured's bodily injuries.[75] Consequently, a jury's consideration of the fact that a plaintiff received some measure of compensation from an underinsured tortfeasor would be excessive with this setoff; the UIM insurer would essentially be credited twice for the same payment: the jury could potentially reduce its award based on its consideration of the plaintiff's recovery from tortfeasor (although the jury may well not know the amount of such recovery), and, on a defendant insurer's motion, the Court would ultimately amend the judgment and reduce the jury's award to reflect the limits of all liability insurance policies available to the plaintiff at the time of the accident.[76]

For the foregoing reasons, this Court rejects Defendant's contention that the jury could properly conclude that Plaintiff "was adequately compensated for any such pain and suffering out of her recovery from the tortfeasor."[77] Instead, this Court holds that tort law applies to the instant motion. Accordingly, the jury's verdict will be reviewed for adequacy pursuant to longstanding Delaware jurisprudence on the issue of adequacy of a jury's verdict.

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[74] *James*, 570 A.2d at 1155 (Del. 1990).
[75] *Nationwide Mut. Auto. Ins. Co. v. Peebles*, 688 A.2d 1374, 1378 (Del. 1997).
[76] 18 Del. C. § 3902(b)(3).
[77] Def.'s Br. in Support of Opp'n. to Pltf.'s Mot. for New Trial at 7.

B. Plaintiff is Not Entitled to a New Trial Due to Jury's Alleged Failure to Award Noneconomic Damages.

1. A Jury's Apparent Failure to Award Economic Damages Does Not *Per Se* Necessitate that a New Trial be Granted.

Plaintiff asserts that the jury's verdict was necessarily inadequate by virtue of the fact that it exactly mirrored Plaintiff's economic damages for the period between the instant accident and a subsequent motor vehicle accident;[78] according to Plaintiff, such a verdict necessarily demonstrates that the jury failed to compensate Plaintiff for pain and suffering.[79] However, this assertion is incorrect. To the contrary, Delaware cases have held that a jury may award nothing for noneconomic damages if the sole evidence of such damages is subjective.

In *Rudnick v. Jacobs*, the parties stipulated that the plaintiff's economic damages totaled $108.85.[80] Despite this, the jury returned a verdict of $92.85, $16 less than the stipulated economic damages.[81] The trial court granted *additur* in the amount of $16, thereby compensating Plaintiff for the full amount of the stipulated economic damages.[82] With respect to the lack of compensation for pain and suffering, the Court stated: "[i]t is evident that the jury considered that the plaintiff's personal injuries and his alleged pain and suffering were not sufficiently important to merit compensation."[83]Specifically, the Court held:

> There was evidence which justified the view, if believed, that the plaintiff was feigning injury and suffering. All the evidence which was calculated to show physical pain and suffering on analysis appears to be subjective, that is to say, having its source in the plaintiff's own statements. There were no outward and visible indications of injury beyond what the jury might well have regarded as very trifling.[84]

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[78] Pltf.'s Mot. for New Trial at 3-4.
[79] *Id.*
[80] 39 Del. 169 (Del. 1938).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*

More recently, this Court upheld a jury's verdict which was less than the plaintiff's economic damages. In *Dunkle v. Prettyman*, the plaintiff allegedly sustained cervical and lumbar spine injuries in a motor vehicle accident and incurred lost wages and medical expenses of approximately $14,500.[85] The plaintiff also had a significant history of preexisting injuries to her spine prior to the accident.[86] The jury returned a verdict of $10,000, and the plaintiff moved for a new trial.[87] This Court denied the plaintiff's motion; the Court's opinion also highlighted some striking similarities to the instant case:

> The Court's conscience is not shocked by the jury's verdict in this case. The jury heard conflicting evidence with respect to damages and, by its verdict, announced that it believed the defendant's expert over the plaintiff's expert. Weighing conflicting testimony is within the sole province of the jury. Moreover, legitimate questions were raised regarding the plaintiff's credibility or, at the very least, the extent to which she provided a complete medical picture to her treating physician. We instruct our juries that they may consider the reliability of the information upon which an expert bases his opinions when determining what weight to give his testimony. Finally, there was credible evidence of a preexisting injury which could explain much of [the plaintiff's] current disability. Although it is impossible to know which, if any, of these factors animated the jury's deliberations, the Court's function here is not to ascribe a motive or rationale for the verdict. Rather, the Court must simply determine if the jury returned a verdict which is contrary to the great weight of the evidence or if, by its verdict, the jury otherwise shocked the conscience of the Court. This jury did neither.[88]

Similarly, in *Mitchell v. Haldar*, a medical negligence case, the jury awarded a total of $15,000 in damages to the plaintiff, notwithstanding the fact that the plaintiff's medical expenses were $37,997.27.[89] Thus, the jury failed to award the full amount of economic damages, let alone noneconomic damages for pain and suffering. Indeed, the plaintiff in *Mitchell* cited to essentially the same cases cited by Plaintiff herein to support an argument for

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[85] 2002 WL 833375, *1 (Del. Super. Ct. 2002).
[86] *Id.*
[87] *Id.*
[88] *Id.* at *2.
[89] 2004 WL 1790121, *1 (Del. Super. Ct. 2004).

a new trial.[90] In denying the plaintiff's motion for a new trial, this Court stated:

> Those cases upon which plaintiffs rely do not stand for the principle that *any* verdict that is less than the medical expenses cannot stand. Rather, they reflect the fact that the trial judge had a discernible discomfort with a verdict that he or she believed was against the great weight of the evidence and grossly inadequate to compensate the plaintiff.
>
> Each of these cases are distinguishable because they are based upon their own unique set of facts and circumstances; as such, the verdict in one cannot logically be compared with another, simply because the verdicts were not greater than the claimed medical expenses. Ultimately, the decision on a motion for new trial requires a judicial assessment based upon the distinct evidence and individual circumstances of each particular case.[91]

Secondary authority is in accord with this view; *American Jurisprudence* states:

> [I]t is not improper for a jury to award a plaintiff damages for lost time and medical expenses, but no damages for his or her injury, disability, or pain and suffering, where the jury could reasonably have concluded that the plaintiff experienced no pain and suffering or if he or she did, that it was de minimis. An award for pain and suffering may also be denied, even though the plaintiff incurred a loss of wages and medical expenses, if the plaintiffs' evidence of injury is subjective.[92]

Decisions of this Court on the issue of whether to grant a new trial are reviewed by the Supreme Court solely to determine whether there was an abuse of discretion.[93] Thus, every jury verdict is unique to its context, and this Court must decide Plaintiff's motion "based upon the distinct evidence and individual circumstances" of this case.[94] Consequently, the mere fact that the

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[90] *Id.* at *6-7.
[91] *Id.* at *8.
[92] 22 Am. Jur. 2d *Damages* § 203 (citations omitted).
[93] *See Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979) ("Generally, in an appeal from either the grant or denial of new trial, the sole question is whether the decision constituted an abuse of discretion.") (citations omitted).
[94] *Mitchell*, 2004 WL at *8.

jury's award mirrored Plaintiff's medical expenses does not *per se* require that Plaintiff be granted a new trial.

2. Given the Subjective and Conflicting Causation Evidence in this Case, the Jury's Verdict Was Proper.

Although a jury is not free to "totally ignore facts which are uncontroverted and against which no inference lies," it is also "well-settled law that a jury may reject an expert's medical opinion when that opinion is substantially based on the subjective complaints of the patient."[95] Thus, just as the Supreme Court has upheld verdicts which patently fail to award noneconomic damages when the sole evidence of pain and suffering is subjective,[96] it is equally proper for juries to disregard expert medical testimony when such testimony is premised exclusively on the plaintiff's subjective complaints.

Defendant cited to a number of Delaware cases which confirm the ability of a jury to reject expert opinions which are predicated on a plaintiff's subjective reports.[97] For example, in *Campbell v. Whorl*, this Court upheld a defense verdict when the evidence of the plaintiff's injury consisted entirely of the plaintiff's subjective reports.[98] Specifically, the Court held:

> Both at trial and in his Motion, Plaintiff has highlighted [the defense medical expert's] conclusion that the accident "caused" the diagnosed lumbar strain, but Plaintiff's own cross-examination

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[95] *Amalfitano v. Baker*, 794 A.2d 575, 578 (Del. 2001) (citations omitted).
[96] *See Rudnick v. Jacobs*, 39 Del. 169 (Del. 1938). ("There was evidence which justified the view, if believed, that the plaintiff was feigning injury and suffering. All the evidence which was calculated to show physical pain and suffering on analysis appears to be subjective, that is to say, having its source in the plaintiff's own statements.")
[97] Def.'s Reply Br. in Support of Opposition to Pltf.'s Mot. for New Trial at 12-14.
[98] 2008 WL 4817078 (Del. Super. Ct. 2008), *aff'd at* 976 A.2d 170 (Del. 2009). *See also Kossol v. Duffy*, 765 A.2d 952 (Del. 2000) (holding that the "conflicting medical testimony" about whether plaintiff's pre-existing injuries had resolved coupled with the "considerable conflicting and inconsistent testimony from [the plaintiff] and all of his witnesses concerning [the plaintiff's] employment history, earnings, injuries, and treatments" allowed the jury to reject the defense expert's opinion that the plaintiff had sustained some degree of injury, given that the defense expert's opinion was based on the plaintiff's subjective complaints.); *Phillips v. Loper*, 2005 WL 268042, *2 (Del. Super. Ct. 2005) ("However, a jury may reject an expert's medical testimony when such testimony is based substantially upon the subjective complaints of the patient.") (citation omitted).

> underscored that [the defense medical expert] did not examine Plaintiff until 2008. [The defense medical expert's] conclusion as to causation of an injury reported in 2004 could only be based upon the past records, which in turn relied upon Plaintiff's subjective self-reporting. Both experts' opinions therefore rested substantially upon subjective complaints and information from the Plaintiff.
>
> Furthermore, Plaintiff's own testimony provided the jury with reasonable grounds to doubt his credibility on the issue of injury. Plaintiff testified that he briefly attended physical therapy over a two-week period shortly after the accident, although he "thought it was more than that."
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> * * *
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> In addition, even if the jury accepted that Plaintiff was injured, the testimony at trial provided ample basis for the jury to infer an alternative cause for Plaintiff's symptoms other than the accident. Plaintiff discussed at some length the heavy physical demands of his work as a postal carrier, and both experts mentioned Plaintiff's periodic low-back discomfort preceding the accident. Furthermore, [the defense medical expert] stated that complaints of low-back pain such as Plaintiff presented are often the result of everyday activities and described Plaintiff's MRI findings as indicative of degenerative, rather than traumatic, injury. In considering this testimony, the jury could reasonably have concluded that Plaintiff did suffer the injuries described by [the plaintiff's medical expert], but that those injuries were traceable to another proximate cause, such as the physical demands of Plaintiff's job as a postal carrier.[99]

The reasoning in *Campbell* is persuasive and applies equally in this case. Significant credibility issues arose for Plaintiff, and the factual predicates to her expert's opinions were undermined in cross-examination. Specifically, Plaintiff's expert, Dr. Yalamanchili, testified that Plaintiff did not alert him to the fact that she was involved in another motor vehicle accident in 2008.[100] Further, Dr. Yalamanchili testified that, at the time he opined that Plaintiff's neck surgery was directly related to the instant accident, he had not had an opportunity to review Plaintiff's prior medical records.[101] Perhaps most damaging, Dr. Yalamanchili was presented with a medical record dated less than two months prior to the instant accident which indicates that Plaintiff had recently undergone cervical X-Rays, and her pain

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[99] *Campbell*, 2008 WL at *5.

[100] Transcript of Videotaped Deposition of Kennedy Yalamanchili, M.D. of Nov. 10, 2010 at 70.

[101] *Id.* at 75.

had intensified to the point that a prescription for an anti-inflammatory drug was issued; Dr. Yalamanchili stated that he had not previously seen this record.[102]

Further, the medical evidence of Plaintiff's alleged injury was not uncontroverted; to the contrary, when asked if he agreed that Plaintiff sustained an injury in the instant accident, Defendant's expert, Dr. Ger, responded as follows:

> She told me she sustained an injury, and I know that she went to the emergency department, and I know she continued to treat after the accident. . .I must believe what people tell me. If she told me she had an injury, I must believe her. If she told me she never had neck problems before the accident, I must believe her unless I can find documentation that disagrees with that.[103]

In this case, the jury was presented with evidence that damaged the credibility of Plaintiff and the reliability of Dr. Yalamanchili's opinions. At the same time, Dr. Ger testified that, at most, Plaintiff may have suffered an exacerbation of a preexisting condition; significantly, Dr. Ger's conclusion was "substantially based on the subjective complaints" of Plaintiff herself.[104] Thus, there was a dispute about the cause of Plaintiff's alleged injuries, and the jury resolved this dispute by rejecting, at least in part, Plaintiff's testimony and Dr. Yalamanchili's opinions and concluding that Plaintiff's surgery was not related to the July 2006 accident. In turn, the jury was free to determine the amount which fully compensates Plaintiff to the extent it found Plaintiff's injuries resulted from the July 2006 accident; in this case, the jury determined such amount to be $9,179. Under such circumstances, the instant jury's verdict is proper and in accord with Delaware law.[105]

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[102] *Id.* at 85-88.

[103] Transcript of Videotaped Deposition of Errol Ger, M.D. of Nov. 1, 2010 at 45-46; *see also id.* at 40 ("All I have to rely on is her history, and she told me she had no problems before the accident whatever. I also have to rely on the records which indicate to me that, for many years preceding the accident, there were neck problems. . . .So did she return to the exact same condition before the accident? I don't know. She said she had no problems before the accident.").

[104] *Amalfitano v. Baker*, 794 A.2d 575, 578 (Del. 2001) (citations omitted); *supra* note 103.

[105] *See supra* text accompanying note 99.

3. A New Trial is Required as a Matter of Law Only When the Defendant is Found Liable but the Jury Disregards Undisputed Evidence of Causation.

"[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."[106] For example, in *Maier v. Santucci*, the jury returned an award of $0, notwithstanding the uncontradicted medical testimony that the plaintiff suffered an injury due to the accident at issue, and the trial court denied the plaintiff's motion for a new trial.[107] In reversing the trial court's decision, the Supreme Court observed that, "[w]hile a jury has great latitude, 'it cannot totally ignore facts that are uncontroverted and against which no inference lies.'"[108]

Plaintiff seeks to extrapolate this principle to the instant jury's verdict. Plaintiff cites *Johnson v. Carney's Contracting Co.* for the proposition that a jury award that matches the plaintiff's stipulated medical expenses "to the penny" necessitates an inference that "the jury decided to award nothing for [p]laintiff's pain, suffering and permanent injury resulting from the collision and related to the cost of medical expenses which it did award."[109] However, in *Johnson*, the plaintiff was diagnosed with a severe head injury, various fractures, and brain damage immediately after the accident; the plaintiff also was afflicted with residual cognitive defects.[110] The defense was based on liability; the defendants adduced evidence of the plaintiff's comparative negligence, and this defense was successful in that the jury apportioned 50% liability to the plaintiff.[111] However, the crucial distinction between *Johnson* and this case is that causation was not central to the jury's determination; in *Johnson*, the plaintiff suffered severe injuries that were quite clearly caused by the collision between the plaintiff's motorcycle and the rear of the defendant's dump truck.[112] The *Johnson* verdict turned on whether and to what extent the defendant was liable to the plaintiff, rather than the extent to

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[106] *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).
[107] *Id.*
[108] *Id.* (citations omitted).
[109] 1998 WL 732893 (Del. Super. Ct. 1998). In *Johnson*, this Court granted *additur* to the plaintiff, with the condition that, if the defendant did not agree to *additur*, a new trial would be ordered as to damages only. *Id.*
[110] *Id.* at *1.
[111] *Id.* at *1-2.
[112] *Id.* at *1.

which the defendant's alleged negligence was the cause of the plaintiff's injuries.

Likewise, in *Raksnis v. Fowler*, this Court addressed a jury verdict which was $1 over the plaintiff's medical expenses and lost wages.[113] The Court stated that the "most plausible inference is that the jury awarded plaintiff her [economic damages] and $1.00 extra for her pain, suffering and impairment."[114] In *Raksnis*, the plaintiff was caring for her mother's cat while her mother was away.[115] When the cat refused to come in and instead remained underneath a car, the plaintiff reached under the car to coax him out; the cat bit the plaintiff, and wound later became infected.[116] Consequently, the plaintiff suffered pain, surgery, hospitalization, and permanent impairment to her arm.[117] This Court found that the jury's verdict sufficiently shocked the conscience as to justify *additur* or, in the alternative, a new trial.[118]

Again, *Raksnis* is a case in which the plaintiff's injuries were quite obviously the direct result of the incident at issue. Just as in *Johnson*, the jury's verdict essentially turned on liability and comparative negligence, rather than the extent to which the defendant's alleged negligence caused the plaintiff's injuries.[119] Thus, Plaintiff's reliance on these cases is misplaced.

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[113] 1997 WL 720718 (Del. Super. Ct. 1997). Notably, the award of $1 over the plaintiff's economic damages was before any reduction for the plaintiff's comparative negligence; the jury found the plaintiff to be 50% liable for her injuries. *Id.* Thus, the actual award would have been considerably less than the plaintiff's economic damages.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* Indeed, after being bitten by her mother's cat, the plaintiff was admitted to the hospital for seven days, stayed in the hospital for seven days, and underwent subsequent physical therapy. *Id.* at *2. The plaintiff sustained a three to four inch purple scar on the underside of her right arm and was diagnosed with a 10% impairment of her right arm. *Id.*

[118] *Id.*

[119] Plaintiff also cited to *Van Arsdall v. Wilk*, 2001 WL 884159 (Del. Super. Ct. 2001). In *Van Arsdall*, the plaintiff was a passenger in a vehicle being driven by her husband; after they were in an accident with another vehicle, the plaintiff sued both her husband and the other drive. *Van Arsdall*, 2001 WL 884149. The plaintiff sustained a broken arm which required surgery; the jury found that the plaintiff's husband was negligent and that his negligence was the proximate cause of the plaintiff's injuries, but nonetheless awarded the exact amount of the plaintiff's out of pocket medical expenses. *Id.* The Court found that the jury failed to comply with its instructions and that *additur* or, alternatively, a new

Finally, the Court acknowledges Plaintiff's reliance on *Coleman v. White*;[120] a factually analogous 2008 case in this Court. In *Coleman*, the plaintiff was injured in a motor vehicle accident, and the jury awarded the plaintiff exactly half of the outstanding medical bills; the defendant stipulated liability, but offered expert testimony that only half of the plaintiff's injuries were attributable to the accident.[121] The Court held that "the only logical way" to interpret the jury's verdict was that it accepted the defendant's expert's testimony that half of the plaintiff's medical bills were attributable to the accident, and awarded $9,546, exactly half of the plaintiff's medical expenses; the Court noted that the jury's award of medical expenses implies at least some pain and suffering, and that an award of *additur* or, alternatively, a new trial was required.[122] Defendant contends that *Coleman* is "easily distinguishable" because, in the instant case, the Plaintiff necessarily received compensation from the tortfeasor, by virtue of this case's status as one for UIM benefits.[123] As discussed more fully *supra*, this Court does not agree with Defendant's assertion that the jury may properly consider the fact that the plaintiff recovered some measure of damages from the tortfeasor in reaching its award. Thus, this Court finds no appreciable distinction between the factual and procedural background of *Coleman* and the instant case; rather, this Court declines to follow *Coleman*.[124]

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trial, should be ordered. *Id.* at *2. Again, the amount of the jury's award did not turn on causation; to the contrary, the jury found that the defendant was negligent and that his negligence was the proximate cause of the plaintiff's injuries, but nonetheless awarded only economic damages.

[120] 2008 WL 4817074 (Del. Super. Ct. 2008).

[121] *Id.*

[122] *Id.*

[123] Def.'s Reply Br. in Support of Opp'n. to Pltf.'s Mot. for New Trial at 11.

[124] This Court acknowledges the importance of *stare decisis. See, e.g.*, *Oscar George, Inc. v. Potts*, 49 Del. 295, 298 (Del. 1955) ("The rule of stare decisis means that when a point has been once settled by decision it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside even though it may seem in later years archaic. . . .[i]ts support rests upon the vital necessity that there be stability in our courts in adhering to decisions deliberately made after careful consideration.") (citations omitted); *Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 WL 1528909, *4 (Del. Ch. 2000) ("*Stare decisis* is not a strictly theoretical concept without important practical applications. Rather, *stare decisis* is founded on public policy. It forms arguably the most important tenet upon which legal reasoning rests."). Nonetheless, this Court's decision in *Coleman*, as with all decisions evaluating the adequacy of a jury verdict, is inherently fact sensitive. In turn, this Court does not view *Coleman* as announcing a precedential rule that the "only logical way" to interpret awards such as the instant award

In this case, Plaintiff had a significant history of back and neck issues, and, on cross-examination, it was revealed that her testifying expert (also her treating physician) had not been provided certain records regarding Plaintiff's pre-accident condition.[125] Likewise, Defendant's expert, Dr. Ger, testified that Plaintiff may have been injured in the instant accident via an exacerbation of her pre-existing condition, but that he reached this possibility solely on the basis of Plaintiff's subjective complaints.[126] Consequently, the amount of the jury's award was dependent upon the extent to which the jury found that Plaintiff's injury was caused by the instant accident. As stated, given that the medical testimony was in conflict and Dr. Ger's opinion as to causation was exclusively based on Plaintiff's subjective complaints, causation became an issue for the jury's determination.[127]

Plaintiff is correct in asserting that "a zero total verdict and a verdict for $9,179 are simply not the same entity,"[128] but it does not necessarily follow that the $9,179 verdict establishes the jury's failure to appropriately compensate Plaintiff. In reaching its verdict, the jury may well have concluded that the amount of $9,179 completely compensated Plaintiff for both economic and noneconomic damages, in proportion to the extent Defendant was the cause of her injuries.

Neither this Court nor any party is privy to the instant jury's reasoning in reaching its verdict, and "the Court's function here is not to ascribe a motive or rationale for the verdict."[129] In those cases discussed *supra*,

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is that the jury failed to adequately compensate the plaintiff for pain and suffering. *Coleman*, 2008 WL at *1. Moreover, the Superior Court docket reveals that there was no further procedural history in *Coleman*; this Court's decision was not appealed, and the Supreme Court of Delaware did not review, much less adopt, modify, or reject, the holding in *Coleman*. Therefore, *stare decisis* does not require this Court to apply the holding in *Coleman* to Plaintiff's instant motion. *See, e.g.*, *Spencer v. Goodill*, 2009 WL 4652960, *7 (Del. Super. Ct. 2009) (holding that, although *stare decisis* is an important consideration for this Court, this Court is nonetheless not required to follow a prior Superior Court decision if this Court finds alternative authority to be more persuasive.).

[125] *See supra* text accompanying note 102.

[126] *See supra* note 103.

[127] *See Dunn v. Riley*, 864 A.2d 905, 907 (Del. 2004).

[128] Pltf.'s Reply Br. at 12.

[129] *Dunkle*, 2002 WL at *2 (emphasis added). It should be noted that the Verdict Sheet in this case directed the jury to "[s]tate in a single sum the amount of your award of

wherein the extent of the defendant's liability, rather than causation, was at issue and the jury's award essentially mirrored the plaintiff's economic damages, it is sometimes proper for the Court to infer that the jury failed to compensate the plaintiff for pain and suffering. This is not such a case. Instead, the jury's verdict turned on causation. Accordingly, this Court does not find that the "only logical way"[130] to interpret the jury's verdict is that the jury disregarded its instructions and neglected to award damages for pain and suffering; under the facts of this case, it is equally possible that the jury found $9,179 to be the proper amount to fully compensate Plaintiff for those injuries which it determined were caused by the 2006 accident.[131] Thus, the jury's verdict cannot be deemed inadequate as a matter of law.

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damages to the plaintiff," with no distinction between economic and noneconomic damages. *See* Verdict Sheet. Plaintiff did not object to this version of the Verdict Sheet.

[130] *Coleman v. White*, 2008 WL 4817074 (Del. Super. Ct. 2008).

[131] Similarly, the jury's note does not establish or even suggest that the jury misunderstood its duty to fully compensate Plaintiff, contrary to Plaintiff's argument. The note consisted of two questions: 1) "Can damages be awarded if we answer no to [the question of whether Plaintiff's surgery was proximately caused by the July 2006 accident]?" and 2) "If we award partial amount will she have to pay health insurance that money or will it be hers to keep?" Pltf.'s Mot. For New Trial Ex. C. In response to the jury's note, the parties jointly devised an instruction for this Court to charge the jury, as follows: "As to the first question, even if your answer to question No. 1 is no, you must award damages in some amount to Plaintiff. And with response to your second question, if you find that the surgery is not related, she does not have to reimburse Medicare or BlueCross/BlueShield for the surgery." Trial Transcript of Nov. 17, 2010 at 6-7. At most, the questions presented by the jury suggest its desire to confirm that a finding that the surgery was proximately caused by the instant accident was not a prerequisite to awarding damages, and to confirm that Plaintiff would be entitled to retain a partial award, rather than be required to surrender such an award to her health insurance carrier. The parties' jointly agreed to the appropriate instruction in response to the jury's inquiries. Thus, it does not follow that the jury's note coupled with its subsequent award supports Plaintiff's assertion that the jury failed to understand and fulfill its duty to fully compensate Plaintiff. To the contrary, the jury was advised that it must award damages of some amount to Plaintiff, even if the instant accident was not the cause of her surgery, and that Plaintiff would not be required to reimburse Medicare or her health insurance carrier. This instruction made it clear that Plaintiff would be entitled to keep the amount awarded, and the jury may well have believed that an award of $9,179, all of which the Plaintiff could retain, was full compensation for the injuries sustained in the instant accident.

C. Defendant is Entitled to Costs Under Rule 54(d).

Defendant moves for costs pursuant to Superior Court Civil Rule 68 and Superior Court Civil Rule 54(d).[132] As a threshold matter, the Court must determine which rule is properly applied to Defendant's motion.

Superior Court Civil Rule 68 sets forth the procedure and effect of an offer for judgment.[133] In relevant part, the rule provides "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."

In contrast, Rule 54(d) is the general provision pertaining to an award of costs. The rule states:

> Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs

Although Rule 68 speaks only to costs incurred subsequent to the filing of an offer for judgment, Defendant contends that, in light of the fact that the jury award was lower than the amount recovered from the tortfeasor, the jury award should be viewed as one for $0 damages and Defendant should be considered the prevailing party for purposes of Rule 54(d). In turn, Rule 68 would not apply.[134] The Supreme Court of Delaware defined the parameters of the terms "prevailing party," for purposes of Rule 54(d), in *Graham v. Keene Corporation*.[135] In *Graham*, the Supreme Court held that it is the award of a judgment that "determines the purely legal question of who is the prevailing party for purposes of an award of costs under Rule 54(d)."[136]

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[132] Plaintiff did not file a response to Defendant's Motion for Costs, but by letter dated January 24, 2011, after the parties had unsuccessfully concluded post-verdict settlement negotiations, Plaintiff requested that the Court "proceed on ruling on the Post-Trial Motions in this matter." Thus, this Court has decided Defendant's Motion for Costs on the present submissions.

[133] In this case, Defendant's Offer for Judgment was $60,001. Def.'s Mot. for Costs at 1.

[134] *See, e.g.*, *Hercules, Inc. v. AIG*, 784 A.2d 481, 509 (Del. 2001) ("[W]here, as here, the plaintiff obtains *no* judgment from the defendant seeking costs (*i.e.,* judgment is for the defendant), Rule 68 does not apply.") (citations omitted).

[135] 616 A.2d 827 (Del. 1992).

[136] *Id.* at 828. Given that this was an issue of first impression for the Supreme Court of Delaware, the Court was guided by federal cases interpreting the analogous rule 54 of the

In the UIM context, this Court has used the amount of the jury's award after the plaintiff's underlying recovery from the tortfeasor has been subtracted when deciding post-trial motions for costs under Rule 68.[137] When following that formula in this case, it is immediately apparent that Plaintiff has obtained no judgment from Defendant; this Court has amended the judgment to $0 in light of the $25,000 Plaintiff received from the tortfeasor vis-à-vis the jury's award of $9,179. As stated, when "the plaintiff obtains *no* judgment from the defendant seeking costs (*i.e.,* judgment is for the defendant), Rule 68 does not apply."[138] Given that that this Court has amended the judgment to reflect an award of $0, it necessarily follows that Plaintiff has obtained no judgment from Defendant and Defendant is indeed the prevailing party for purposes of Rule 54(d).[139] Therefore, under Rule 54(d), Defendant is entitled to costs of $3,732.35.[140]

Federal Rules of Civil Procedure. *Id.* ("Thus, in federal court where a defendant is found liable on an issue at trial, and the jury awards compensation to the plaintiff, the latter is the prevailing party. This is true even when the defendant does not ultimately pay anything to the plaintiff as a result of set-offs of amounts already received from settling defendants. Such credits do not alter the fact that the verdict was entered in favor of plaintiff.") (citations omitted).

[137] *See Casarotto v. United Servs. Auto. Ass'n.*, 2006 WL 336746 (Del. Super. Ct. 2006) (subtracting the underlying $15,000 recovery from the UIM award of $22,500; the result of $7,500 was not more favorable than the defendant's $15,101 offer for judgment, consequently, the plaintiff was ordered to pay Defendant's costs subsequent to the filing of the offer for judgment.). However, all jurisdictions are not in accord on this issue; some jurisdictions hold that collateral sources should be deducted when comparing the plaintiff's award to the offer for judgment, while others hold that collateral sources should not be deducted. *See* Annotation, *Application and Construction of State Offer for Judgment Rule-Determining Whether Offeror is Entitled to Award*, 2 A.L.R. 6th 279, §§ 24-25 (2005) (comparing cases from jurisdictions which deduct collateral sources when determining the judgment finally obtained and jurisdictions which do not so deduct.).

[138] *See supra* note 132.

[139] *Graham,* 616 A.2d at 828 ("[It is the award of a judgment] which determines the purely legal question of who is the prevailing party for purposes of an award of costs under Rule 54(d).")

[140] This figure represents the following costs: Dr. Ger's witness fee of $2,500, a Court Reporter fee of $429.85, a Videographer fee of $352.75, Court filing fees of $249.50, and Plaintiff's deposition transcript fee of $200.25. Def.'s Mot. for Costs at 2. As stated, Plaintiff did not file a response to Defendant's motion for costs, but instead requested that the Court "proceed on ruling on the Post-Trial Motions in this matter." *See supra* note 132. Thus, the foregoing figures are effectively unopposed.

CONCLUSION

For all the reasons stated above, Plaintiff's motion for a new trial is **DENIED**. It necessarily follows that Defendant's motion to amend judgment is **GRANTED,** and Defendant's Motion for Costs under Rule 54(d) is **GRANTED.**

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary