



***Jackson v. Wallo***

C.A. No. K10C-02-038 JTV

December 26, 2012

**ORDER**

Upon consideration of the plaintiff's Motion for Reargument, the defendant's opposition, and the record of this case, it appears that:

1. The plaintiff, Stacey Jackson, has moved for reargument of a September 4, 2012 order issued by this Court that denied her motion for a new trial following the jury's return of a zero verdict. In that order, the Court was not persuaded that there was "conclusive" evidence of injury caused by the defendant, and, therefore, it would not set aside the jury's verdict.<sup>1</sup>

2. This litigation arises out of an accident that occurred on March 7, 2008, when a vehicle in which the plaintiff was an occupant was struck in the rear by a vehicle operated by the defendant. The plaintiff brought suit for personal injuries, and the jury returned a zero verdict. The aforementioned motion for a new trial primarily focused upon what the plaintiff characterized as "undisputed" evidence that neck and shoulder soft tissue injuries were sustained as a result of the accident. The plaintiff argued that the rule established in *Maier v. Santucci*<sup>2</sup> required the court to set aside the verdict because the defendant's own expert, Dr. Sabbagh, conceded that the plaintiff's alleged shoulder and neck injuries were caused by the defendant, and that this opinion was uncontroverted at trial. The court denied the plaintiff's motion.

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<sup>1</sup> *Hoyle v. Wallo*, C.A. No. K10C-02-038, Vaughn, J., at 6 (Del. Super. Sept. 4, 2012) (ORDER).

<sup>2</sup> 697 A.2d 747, 748 (Del. 1997) (holding that, "where the evidence conclusively establishes the existence of an injury, however minimal, a jury award of zero damages is against the weight of the evidence and it is an abuse of discretion to deny a new trial").

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3. In the September 4, 2012 order, I rejected the plaintiff's contention that the *Maier v. Santucci* rule requires a new trial in this case.<sup>3</sup> I also considered the Delaware Supreme Court's *Amalfatino v. Baker* opinion as part of my analysis, and determined that the plaintiff had not presented objective medical evidence to support her injury theory.<sup>4</sup> I concluded that when Dr. Sabbagh stated during a deposition that the plaintiff had received cervical strain and right shoulder strain injuries in the accident, he was "simply repeating what he had seen in early medical records that were created in the days following the accident . . . [and] was in no position to express an opinion . . . from his own knowledge."<sup>5</sup> Another source that potentially presented an objective finding (a spasm revealed on palpation) was a medical record from Physical Therapy Evaluation that was dated March 12, 2008, five days after the accident.<sup>6</sup> The physical therapist who prepared the record was not called as a witness and there is no evidence of the therapist's qualifications.<sup>7</sup> As a result, no causal link was definitively established between the accident and the reported trapezius pain.<sup>8</sup> Likewise, notes from another non-testifying doctor who saw the plaintiff shortly after the accident, Dr. Chervenak, were introduced at trial. These notes do discuss neck

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<sup>3</sup> *Hoyle*, C.A. No. K10C-02-038, at 6.

<sup>4</sup> *Id.* at 3 (citing *Amalfatino v. Baker*, 794 A.2d 575, 576 (Del. 2001)).

<sup>5</sup> *Id.* at 4-5.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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pain and mild cervical strain, but they were so difficult to read that I was unable to ascertain whether the doctor actually made any objective finding.<sup>9</sup> Ultimately, I held that the plaintiff's failure to set forth uncontradicted, objective evidence of any injury caused by the accident meant that she had not met the "conclusive evidence" standard, and the Court was not required to set aside the jury's verdict.<sup>10</sup>

4. The standard of review for a Rule 59(e) motion for reargument is a familiar one. A motion for reargument will usually be denied unless the court has "overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."<sup>11</sup> "A motion for reargument should not be used merely to rehash the arguments already decided by the Court, nor will the Court consider new arguments that the movant could have previously raised. The movant has the burden of demonstrating newly discovered evidence, a change in the law or manifest injustice."<sup>12</sup>

5. The plaintiff contends that the court misconstrued the holdings of *Maier* and *Amalfitano* by *requiring* uncontradicted, objective medical findings of injury to be in evidence before *Maier's* "conclusive evidence of injury" standard can be met.

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<sup>9</sup> *See Id.* at 5-6.

<sup>10</sup> *Id.*; *See Amalfitano*, 794 A.2d at 578.

<sup>11</sup> *Lamourine v. Mazda Motor of Am., Inc.*, 2007 WL 3379048, at \*1 (Del. Super. Sept. 24, 2007).

<sup>12</sup> *Reid v. Hindt*, 2008 WL 2943373, at \*1 (Del. Super. July 31, 2008) (quoting *Brooks*, 2008 WL 435085, at \*1 ) (internal quotation marks omitted).

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She again asserts that the standard has, in fact, been met, and the zero verdict is inadequate as a matter of law. The plaintiff also renews her contention that neck and shoulder strain injuries were not in dispute, and that the defendant conceded this before and throughout the trial. The plaintiff again argues that the jury instructions read at trial were improper, and that the pattern jury instruction detailing the burden of proof should have been amended. The plaintiff contends that Dr. Sabbagh was entitled to rely on past medical records in coming to a concrete diagnosis. Lastly, the plaintiff asserts that even if objective findings are necessary, Dr. Chervenak's progress notes clearly contain such a finding — tenderness upon palpation.

6. The defendant contends that the plaintiff's Motion for Reargument reiterates the same arguments set forth in the original Motion for New Trial, and fails to demonstrate that the Court overlooked any precedent, or misinterpreted the law or facts of the case. He also points out that the jury was entitled to dismiss any alleged "opinion" from Dr. Chervenak, because he did not testify and his "opinion" was not proffered to a reasonable degree of medical probability.

7. I am inclined to agree with the positions set forth in the defendant's response to the instant motion. I thoroughly considered both *Maier* and *Amalfitano* in resolving the plaintiff's motion for a new trial, and found that this case is not constricted by either opinion in the manner advanced by the plaintiff. In the case *sub judice*, the alleged neck and shoulder soft tissue injuries were not "conclusively established" because there were no "uncontradicted, objective findings" of said

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injuries offered by an expert to a reasonable degree of medical probability.<sup>13</sup> The plaintiff's argument regarding the jury instructions that were implemented is unavailing, as I have already determined that the instructions read to the jury in this case were proper. I also find the plaintiff's contentions regarding the testimony of Dr. Sabbagh and the notes of Dr. Chervenak to be thinly veiled attempts to raise the same arguments already ruled upon by this Court in the September 4, 2012 order. I recognize that plaintiffs frequently encounter logistical difficulties when dealing with medical witnesses in personal injury litigation, but the plaintiff has not convinced me that I misapprehended the law or the facts of this case in any cognizable way. In sum, the arguments in the plaintiff's motion merely express disagreement with the Court's conclusions in the September 4, 2012 order, and that is not enough to meet the Rule 59(e) standard.

8. For the foregoing reasons, the motion for reargument is ***denied***.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

oc: Prothonotary  
cc: Order Distribution  
File

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<sup>13</sup> See *Reid v. Hindt*, 2006 WL 1148819, at \*2 (Del. Super. Jan. 31, 2006) (finding that a jury can reject subjective complaints as not credible, but not uncontradicted, objective medical findings).