SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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June 4, 2012

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Re: ***Plant v. Rosado***
C.A. No. N10C-11-048 JRS
Upon Plaintiffs' Motion for a New Trial. **DENIED.**

Dear Counsel:

As you know, this matter was tried to a jury on March 26-28, 2012. The jury returned a verdict in favor of the defendant upon concluding: (1) Mary Plant and Jose A. Garcia Rosado were each 50 percent at fault for the accident; and (2) any fault on Mr. Rosado's part was not a proximate cause of Ms. Plant's alleged injuries. Plaintiffs have now moved for a new trial. After carefully considering the plaintiffs'

motion and the defendants' response, the Court has determined that the motion must be **DENIED.**

Factual Background

This case arises out of an automobile accident which occurred on March 2, 2009, involving plaintiff, Mary Plant, and defendant, Jose A. Garcia Rosado. Ms. Plant's husband, Alfonzo Plant, Sr., brought a claim of loss of consortium. Mr. Rosado's business, Joe & Son Auto Repair, was also named as a defendant as it was alleged that Mr. Rosado was acting on his business' behalf at the time of the accident.

Ms. Plant alleged, *inter alia*, that she sustained a right shoulder rotator cuff tear as a proximate result of the accident. She presented the testimony of her treating physician, Dr. Evan Crain, who offered an opinion that Ms. Plant's right shoulder injury was proximately caused by the March 2, 2009 accident. In response, Mr. Rosado called Dr. Damien M. Andrisani who opined that Ms. Plant's right shoulder injury pre-dated the March 2 accident. Both Dr. Crain and Dr. Andrisani are well-credentialed orthopedic surgeons.

To put it mildly, Ms. Plant and Mr. Plant had substantial difficulty recalling and reciting Ms. Plant's medical history. This history was significant since it involved prior injury and prior surgery to Ms. Plant's right shoulder, the area of her body she claimed to have been injured in the March 2, 2009 accident. The Court will not belabor the point with references to the many instances where Ms. Plant and Mr.

Plant either could not recall significant aspects of Ms. Plant's medical history or contradicted prior sworn testimony regarding her medical history. Suffice it to say, there was ample bases for the jury to conclude that neither Mr. or Mrs. Plant were credible medical historians.

The medical testimony boiled down to a fundamental disagreement between two competent orthopedic surgeons. Dr. Crain, on behalf of Ms. Plant, believed that there was medical evidence to suggest that Ms. Plant's right shoulder injury was a new injury proximately caused by the March 2, 2009 accident. Dr. Andrisani, on the other hand, testified that the medical evidence, including an MRI study and Dr. Crain's surgical report, did not reveal a new right shoulder injury from the March 2, 2009 accident. Moreover, there was evidence to suggest that Dr. Crain did not have all of the relevant records regarding Ms. Plant's medical history at the time he reached his causation opinion.

On the second day of trial, a juror reported that she had a past negative experience with Dr. Crain. In a note to the Court, she explained that she did not recall her past encounter with Dr. Crain until after she saw his videotaped trial testimony. After questioning the juror, the Court determined that it was appropriate to excuse her from further service. Neither plaintiffs' nor defense counsel requested that the Court engage in any further inquiry of the juror and neither expressed any objection or concern regarding the manner in which the Court addressed the juror's report of her

past contact with Dr. Crain. Throughout the trial, the Court repeatedly admonished the jury not to discuss the case or any aspect of it amongst themselves or with anyone else. Neither the Court nor counsel noted any concern that any juror had disregarded this admonition.

In his closing argument, defense counsel suggested that the lack of any medical evidence of shoulder complaints immediately prior to the March 2, 2009, automobile accident did not mean that Ms. Plant was not suffering from right shoulder pain. In this regard, defense counsel pointed to Ms. Plaint's faulty memory of her medical history. Plaintiffs' counsel offered no objection to this argument.

The jury retired for deliberations at 11:25 a.m. and returned with its verdict at 12:45 p.m. During deliberations, the jury considered approximately one and a half days worth of trial testimony from 6 witnesses.

Motion for New Trial Standard of Review

When considering a motion for new trial under Rule 59,[1] the Court must appreciate that "[t]raditionally, the court's power to grant a new trial has been exercised cautiously with extreme deference to the findings of the jury."[2] Further, "when the case involves a controverted issue of fact in which the evidence is conflicting and out of the conflict may be gathered sufficient evidence to support a

[1]Super. Ct. Civ. R. 59.

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

verdict for either party, the issue of fact will be left severely to the jury...."[3] The Court will not upset the verdict of a jury unless "the evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result."[4] Stated differently, "[a] jury's award is presumed correct and just unless [it is] so grossly out of proportion to the [evidence presented] as to shock the Court's conscience and sense of justice."[5]

Discussion

Plaintiffs raise four issues in support of their motion for new trial: (1) juror misconduct; (2) verdict against the great weight of the evidence; (3) improper closing argument by defense counsel; and (4) inadequate jury deliberation. The Court will address each issue in turn.

1. Juror Misconduct

At the outset, the Court notes that the plaintiffs have waived any objection to the manner in which the Court addressed the juror's report regarding her prior knowledge of Dr. Crain because plaintiffs voiced no objection during trial. Simply stated, it is not appropriate for counsel to "sandbag" the Court and counsel with an after-trial objection in this regard. Even if plaintiffs' counsel had properly preserved

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[3] *Storey v. Camper*, 401 A.2d 458, 462 (Del. 1979).

[4] *Id.* at 465.

[5] *Porter v. Murphy,* 2001 WL 1738872, at *1 (Del. Super.).

his objection, however, the Court would still find that the objection was unfounded. The juror in question followed the Court's instructions by reporting the fact that she recognized Dr. Crain from a past association shortly after she realized the potential conflict. The fact that she did not make the association immediately upon hearing Dr. Crain's name is not unusual and not a basis to question her credibility. When she saw Dr. Crain's video trial deposition she made the association and then made her report to the Court. There is simply no basis to suggest that this juror disregarded any of the Court's instructions, including the Court's instruction that the jurors refrain from discussing any aspect of the trial amongst themselves during the course of the trial.[6] Thus, there is no basis to conclude that there was juror misconduct much less that the jury's verdict was prejudiced by misconduct.[7]

2. The Jury's Verdict Was Not Contrary to the Great Weight of the Evidence

As noted above, neither Mr. Plant nor Mrs. Plant presented to the jury as reliable historians of Ms. Plant's medical history. Whether this reflects an intent on

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[6] The Court acknowledges that it did not inquire of the juror whether she had discussed her past association with Dr. Crain with the other members of the jury. Even though neither party requested that such an inquiry be made, having received plaintiffs' motion on this issue, the Court now wishes that it had done so *sua sponte* if, for no other reason, than to quash the second-guessing that plaintiffs have urged the Court to engage in here.

[7] *See Klint v. Brennan*, 2004 WL 1588326, at *1 (Del. Super. July 9, 2004) (rejecting argument on a motion for new trial that jury verdict was tainted by extraneous evidence and holding that "Delaware law strongly disfavors a juror's impeachment of the verdict once the jury has been discharged").

their part to deceive or a series of honest mistakes is not for this Court to say. The relevant point is that the jury had a basis in the evidence to conclude that Ms. Plant's testimony regarding the nature and extent of her injuries was not credible.[8] Moreover, the expert testimony was in direct conflict. It was within the province of the jury to accept Dr. Andrisani's testimony and to reject Dr. Crain's testimony.[9] The Court will not second-guess the jury's decision in this regard.

3. Defense Counsel's Closing Argument

Again, at the outset, the Court notes that plaintiffs' counsel did not object to defense counsel's closing argument. He has, therefore, waived the objection.[10] Even if the objection had not been waived, however, the Court would find that the objection lacks merit. Defense counsel simply pointed out that the mere absence of medical records does not indicate that the plaintiff was not suffering from pain or discomfort. This argument was all the more appropriate in the wake of Mr. and Mrs. Plant's inconsistent testimony regarding Ms. Plant's history of right shoulder injury.

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[8] *See Waller v. Patrick*, 2002 WL 31474519, at *1 (Del. Super. Oct. 29, 2002) (noting that jury may base a finding of no causation upon a conclusion that the plaintiff's testimony was not credible).

[9] *See Mumford v. Paris*, 2003 WL 231611, at *4 (Jan. 3, 2003) (holding that in a case involving a "battle of the experts" the jury may accept the testimony of one expert and reject the testimony of another).

[10] *See General Motors Corp. v. Grenier*, 981 A.2d 531, 541 (Del. 2009) (holding that objections to closing arguments must be made "contemporaneously" and that failure to do so "waives any claim of error.").

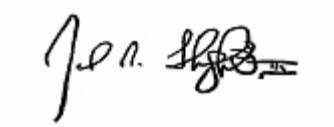
4. The Length of Jury Deliberations

This was not a complicated case. The jury was presented with ample bases to question plaintiffs' credibility with regard to Ms. Plant's medical history. The jury was also confronted with a straight-forward disagreement between two competent medical experts regarding the cause and extent of Ms. Plant's right shoulder injury following the March 2, 2009 accident. The jury deliberated for more than an hour. The Court is satisfied that the jury adequately considered the evidence and reached an informed verdict.[11]

Based on the foregoing, the plaintiffs' motion for new trial must be **DENIED.**

IT IS SO ORDERED

Very truly yours,



Joseph R. Slights, III

[11] *See Duhadaway v. Feeney Chripractic Care Centre, P.A.*, 1999 WL 1611422, at *1 (Del. Super. March 1, 1999) (holding "haste or shortness of time taken by a jury in arriving at a verdict has no effect upon the validity of the verdict") (citation omitted).