IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER CAMPBELL,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 05C-08-084 PLA
v.	)	
	)	
KENNETH A. WHORL,	)	
	)	
Defendant.	)	

Submitted: September 22, 2008
Decided: October 30, 2008

UPON PLAINTIFF'S MOTION FOR A NEW TRIAL
DENIED
UPON DEFENDANT'S MOTION FOR COSTS
GRANTED

Kenneth M. Roseman, Esq., KENNETH ROSEMAN, P.A., Wilmington, Delaware, Attorney for Plaintiff

Nancy Chrissinger Cobb, Esq., CHRISSINGER & BAUMBERGER, Wilmington, Delaware, Attorney for Defendant

I. Introduction

Before the Court are a Motion for a New Trial filed on September 9, 2008 by Plaintiff Christopher Campbell ("Plaintiff") and a Motion for Costs filed by Defendant Kenneth A. Whorl ("Defendant") on September 22, 2008.

Plaintiff contends that the jury's verdict in favor of Defendant must be set aside because it was contrary to uncontroverted expert medical testimony establishing injury and causation. For reasons discussed more fully herein, the Court finds that both injury and causation were contested at trial and that the verdict was well within the evidence. Furthermore, the Court finds that Defendant is entitled to recover his requested costs.

II. Factual Background

This is a personal injury case arising from a vehicle collision that occurred on August 11, 2004. While making a left turn, Plaintiff's car was struck on the right passenger side by a vehicle driven by Defendant. Plaintiff filed suit in this Court and trial was held on September 8, 2008.

At trial, Plaintiff testified that he had been in good health prior to the accident, aside from some sports-related back pain during high school more than a decade prior, but that he experienced low-back and neck pain following the accident. Six days after the collision, Plaintiff sought

treatment from his family physician and was referred to Dr. Arnold B. Glassman, a specialist in physical medicine and rehabilitation. Dr. Glassman referred Plaintiff for physical therapy at their first appointment, and he attended six physical therapy sessions between August 30 and September 14, 2004.[1]

Plaintiff related that his neck pain resolved within a few months, but that the back pain recurred intermittently. Consistent with the stated expectations of both sides' medical experts, Plaintiff indicated that his back pain was exacerbated by physical activity and that he experienced an increase in symptoms apparently connected to his work as a postal carrier when he was transferred from a driving delivery route to a walking route in 2005. Plaintiff explained that when assigned to a walking route, he works six days a week and spends approximately two-and-a-half hours each working day standing to lift and sort tubs of mail before walking his designated route for six hours while carrying loads of mail weighing up to thirty pounds.[2]

Following his route change, Plaintiff returned to Dr. Glassman in March 2006, at which time he was referred for an additional five sessions of

[1] Trial Tr. 34:5-8.

[2] *Id.* at 19:4-7; 21:17-18; 22:16-19; 37:21.

physical therapy. After this March 2006 appointment, Plaintiff did not visit Dr. Glassman again until July 30, 2008.

According to deposition testimony from Dr. Glassman offered by Plaintiff at trial, Dr. Glassman diagnosed Plaintiff with chronic low-back injury related to muscle, tendon, and ligament damage and with facet arthropathy, a form of injury to the facet joints of the spine. Dr. Glassman based his diagnoses in part upon his physical examination of Plaintiff in the week after the accident, when he observed straightening of the curve of Plaintiff's neck, elevation of the right shoulder girdle, tightness and near-spasm of the musculature, limited range of motion, and low-back tenderness. When asked whether these observations constituted objective indications of injury, Dr. Glassman responded, "Well, with variations between different medical specialties, yes, I would think the elevation of the shoulder girdle, the straightening of the cervical spine, what I felt was almost spasm in his neck, I would think these would be objective signs of injury."[3] During Dr. Glassman's second evaluation on September 14, 2004, and every subsequent appointment, however, all objective indications were normal.[4] Dr.

[3] Docket 36, Ex. A (Dep. of Arnold B. Glassman), at 6:4-12.

[4] *Id.*, Ex. A., at 16:12-19.

Glassman concluded that Plaintiff's condition was causally related to the accident based upon Plaintiff's self-reported history:

> Q: Doctor, in your opinion were the injuries that you just diagnosed for us . . . caused by the motor vehicle collision of August 11, 2004?
> A: Based upon the history that I received, yes.[5]

This history included pre-accident episodes of low-back discomfort, which Dr. Glassman viewed as unsurprising given Plaintiff's age and employment as a postal carrier.[6] Dr. Glassman opined that Plaintiff's injuries would be permanent and that he expected Plaintiff to continue to experience exacerbations of his symptoms with physical activity.

Defendant offered expert medical testimony from Dr. Alan J. Fink, a neurologist who examined Plaintiff in May 2008. Dr. Fink found Plaintiff's complaints of low-back pain from the time of the collision through 2005 to be consistent with lumbar strain resulting from the accident, based upon a review of Plaintiff's medical records and diagnostic study results from that time period. As to Plaintiff's complaints from 2006 onward, Dr. Fink submitted that "[i]t becomes difficult to . . . tease out whether [Plaintiff's complaints] would be due to his initial accident versus something that would

[5] *Id.*, Ex. A, at 7:13-18.

[6] *Id.*, Ex. A, at 16:3-11.

happen, say, in 2008."[7] Dr. Fink repeatedly emphasized that he found no objective confirmation of injury upon examination or in his review of previous records and testing.[8] Dr. Fink noted that low-back pain complaints are often caused by routine, everyday activities, rather than a sudden trauma or accident. More specifically, he evaluated an October 2004 MRI of Plaintiff's spine and stated that the only clinically significant findings were changes attributable to degenerative disc disease, rather than trauma. Furthermore, Dr. Fink considered Plaintiff's pre-accident history of intermittent low-back pain to be consistent with degenerative disc disease as shown on the MRI.[9]

Following the presentation of evidence, the Court directed a verdict in favor of Plaintiff on the issue of liability because Defendant was unlawfully driving his vehicle on the shoulder when Plaintiff executed his left turn. Due to the position of the Defendant's car in the shoulder, Plaintiff did not notice it in time to avoid the collision. The Court did not direct a verdict on proximate cause because the medical experts' findings as to the causation of

[7] Trial Tr. 80:9-13.

[8] *Id.* at 79:3-7.

[9] *Id.* at 81:1-13.

Plaintiff's injuries were based entirely upon Plaintiff's subjective rendition of the accident as the cause of his ongoing symptoms of back and neck pain.

During deliberations, the jury delivered a note that read:

> If we vote "YES" on question #1 [as to whether Defendant's negligence was the proximate cause of injury to Plaintiff], must we assign an amount of damages or is it OK to say ZERO?
>
> When did [Plaintiff] consult an attorney in this matter [and/or] when was the lawsuit filed?
>
> What was the time line for last treatment (PT) and when did he next consult a physician for this issue?

The Court responded to the first of the jury's questions by explaining that the jury must assign a damages amount if proximate cause was found. As to the second and third jury inquiries, the Court indicated that it could not respond because any answer would constitute an impermissible commentary on the evidence. The jury deliberated further and subsequently returned a verdict in favor of the Defendant.

III. Parties' Contentions

Now before the Court is Plaintiff's Motion for a New Trial, filed pursuant to Superior Court Civil Rule 59,[10] and Defendant's Motion for Costs.[11] Plaintiff argues that the evidence as to the existence of Plaintiff's

[10] *See* Docket 36 (Pl.'s Mot. for New Trial).

[11] *See* Docket 39 (Def.'s Mot. for Costs).

injury and its causation "was uncontradicted and confirmed by objective testing on examination."[12] Plaintiff relies upon *Amalfitano v. Baker*[13] for the proposition that a new trial must be granted where the jury returns a defense verdict despite "uncontradicted medical evidence of injuries and their proximate cause, confirmed by independent objective testing, [that] meet[s] the standard of 'conclusive' evidence of injury that would require a reasonable jury to return a verdict for at least minimal damages."[14] Thus, Plaintiff contends that no reasonable jury could have returned a verdict in favor of the Defendant.

Defendant submits that Plaintiff's argument is flawed because the evidence as to injury and causation was controverted.[15] Defendant notes Dr. Fink's testimony that the existence of any injury could not be confirmed through objective testing. Furthermore, Defendant points out that Plaintiff's own medical expert testified as to Plaintiff's history of occasional activity-related back pain, which differed somewhat from Plaintiff's testimony that he had only experienced prior back pain during high school.[16] Therefore,

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[12] *Id.*

[13] 794 A.2d 575 (Del. 2001).

[14] Docket 36 (quoting *Amalfitano*, 794 A.2d at 577).

[15] Docket 38 (Def.'s Resp. to Pl.'s Mot. for New Trial), ¶ 2.

[16] *Id.*

Defendant questions the applicability of *Amalfitano*, given that the existence of the injury was controverted and the testifying experts identified the car accident as the cause of Plaintiff's complaints solely on the basis of Plaintiff's self-reported history.[17]

IV. Standard of Review

In considering a motion for a new trial, the trial court begins with the presumption that the jury's verdict is correct.[18] This presumption reflects the significant deference given to the jury in its role as fact-finder.[19] A jury's verdict will only be set aside if it is found to be "against the great weight of the evidence."[20] In other words, the trial court cannot grant a new trial unless a review of all of the evidence reveals that "the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result."[21]

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[17] *Id.*, ¶ 4.

[18] *Patterson v. Coffin*, 854 A.2d 1158, 2004 WL 1656514, at *2 (Del. 2004) (TABLE); *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997).

[19] *Young*, 702 A.2d at 1236; *Caldwell v. White*, 2005 WL 1950902, at *3 (Del. Super. May 25, 2005).

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

[21] *Id.*

V. Analysis

A. Plaintiff's Motion for a New Trial

A jury retains the freedom to assess a plaintiff's credibility regardless of whether the plaintiff's assertions are presented through direct testimony or incorporated into an expert's testimony as the basis of an expert opinion. Such credibility determinations are the sole province of the jury. Where an expert "in the process of formulating an opinion, [relies] upon the *subjective* representations of the plaintiff . . . the jury may accept or reject these representations as it sees fit."[22] As a result, a medical expert's testimony may be rejected "when such testimony is based substantially upon the subjective complaints of the patient."[23]

In this case, the expert medical testimony as to both injury and causation was rooted in Plaintiff's subjective reports of his history and complaints. As a starting point, Dr. Glassman's testimony that he "would think" his observations upon Plaintiff's initial evaluation were objective signs of injury was tentative. Moreover, Dr. Glassman directly acknowledged that Plaintiff's self-reported history provided the basis for his

[22] *Gier v. Kananen*, 628 A.2d 83, 1993 WL 227390, at *2 (Del. June 7, 1993) (TABLE) (emphasis added).

[23] *Phillips v. Loper*, 2005 WL 268042, at *2 (Del. Super. Jan. 27, 2005).

opinion that the car accident caused the injuries he had diagnosed. Dr. Fink testified at several points that neither physical examination nor diagnostic testing revealed any objective confirmation of Plaintiff's complaints and that lumbar strain is generally not susceptible to objective confirmation.[24]

Both at trial and in his Motion, Plaintiff has highlighted Dr. Fink's conclusion that the accident "caused" the diagnosed lumbar strain, but Plaintiff's own cross-examination underscored that Dr. Fink did not examine Plaintiff until 2008.[25] Dr. Fink'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."[26] Following his MRI in October 2004, Plaintiff did not see Dr. Glassman

[24] *See* Trial Tr. 78:8-21; 79:7.

[25] *Id.* at 82:11-13.

[26] *Id.* at 34:7-8.

again until December 2005. Plaintiff's next visit to Dr. Glassman in March 2006, subsequent to his transfer to a walking route at work, was followed by an even lengthier gap in appointments lasting until July 2008, less than two months before trial. The second and third inquiries submitted by the jury, which sought to obtain information regarding the date suit was filed and the timeline of Plaintiff's physical therapy and physician appointments, suggest the verdict may reflect a determination that Plaintiff's stated complaints were not credible when viewed in light of his actions. Such a determination would have been within the evidence.

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, Dr. Fink 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.[27] In considering this testimony, the jury could reasonably have concluded that Plaintiff did suffer the injuries described by Dr.

[27] *Id.* at 80:14-18.

Glassman, but that those injuries were traceable to another proximate cause, such as the physical demands of Plaintiff's job as a postal carrier.

Thus, the expert medical testimony in this case placed the existence of injury in controversy and made clear that both experts' conclusions that the litigated accident caused Plaintiff's symptoms relied upon Plaintiff's subjective complaints and self-reported history. If they chose to credit Dr. Fink's testimony, jurors could reasonably have concluded that Plaintiff's subjective complaints were unconfirmed by objective testing. Although the medical experts were in agreement that Plaintiff did not appear to be exaggerating symptoms, his trial testimony left room for the jury to doubt his credibility and presented a potential alternative cause of injury. The verdict reflects that the jury apparently rejected Plaintiff's subjective representations, as it was free to do.

The jury's inquiry as to whether they could return a verdict finding that Defendant proximately caused injury to Plaintiff but that damages were zero does not support Plaintiff's argument that the verdict was against the great weight of the evidence. Taken as a whole, the jury's note suggests doubts about the existence of an injury and proximate cause, and these doubts were ultimately manifested in a defense verdict. The fact that the jury may have worked through some confusion as to how their verdict

should accurately reflect those doubts does not entitle Plaintiff to have the verdict overturned. Significantly, the two other questions in the same jury note -- which concern the "timeline" as to when Plaintiff contacted an attorney, last underwent physical therapy, and consulted a physician following the conclusion of that physical therapy -- strongly indicate that the jury was focusing negative attention on Plaintiff's credibility.

Amalfitano is inapposite here because it only addresses, and is properly restricted to, cases in which there is uncontroverted evidence as to injury and proximate cause that is based not merely upon a plaintiff's subjective complaints but upon "*the results of . . . objective tests*."[28] Before and after *Amalfitano*, Delaware courts have carefully guarded the jury's traditional role in weighing credibility where experts offer opinions that rely in whole or in substantial part upon a plaintiff's subjective contentions.[29] *Amalfitano* stands for the principle that a jury "cannot totally ignore facts

[28] *Amalfitano*, 794 A.2d at 576 (emphasis in original).

[29] *See Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988) ("When an expert's opinion of causality is based in large part upon the patient's recital of subjective complaints and the trier of fact finds the underlying facts to be different, the trier is free to reject the expert's conclusion."); *Brown v. Hudson*, 2008 WL 4152741, at *1 (Del. Super. Aug. 29, 2008); *Butler v. Tharp*, 2006 WL 1062898 (Del. Super. Mar. 2, 2006); *Phillips*, 2005 WL 268042, at *2; *Gier*, 1993 WL 227390, at *2. Indeed, the *Amalfitano* Court highlighted the limits of its holding in observing that "[i]t is 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." 794 A.2d at 578.

which are uncontroverted and against which no inference lies"[30] and must, absent unusual circumstances, treat as conclusive "[e]vidence that is unrebutted when presented by one side [and] left uncontradicted by the other party."[31] Its predecessor case, *Maier v. Santucci*, held that a zero verdict is unacceptable as a matter of law where it was uncontested that the plaintiff suffered injury that was causally related to defendant's negligence.[32]

The situation in the instant case is distinguishable. As the *Amalfitano* opinion makes clear, the defendant in that case never placed proximate cause at issue:

> At no time did the cross-examination of either doctor elicit testimony inconsistent with their opinion that this accident proximately caused the injuries about which she complained. Nor did the defense offer independent medical testimony to counter [plaintiff's experts'] opinions. Indeed, defense counsel went so far as to admit in closing argument that the medical records evidenced minimal neck and back strain from this accident.[33]

Similarly, proximate causation had been conceded in *Maier*, leaving only the extent of damages at issue.[34] By contrast, in this case Defendant countered

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[30] *Amalfitano*, 794 A.2d at 578 (quoting *Maier v. Santucci*, 697 A.2d 747, 749 (Del. Super. 1997)).

[31] *Id.*

[32] *Maier*, 697 A.2d at 749.

[33] *Amalfitano*, 794 A.2d at 577.

[34] *Maier*, 697 A.2d at 749.

Plaintiff's evidence as to injury and proximate cause, both through cross-examination and the presentation of independent medical testimony from Dr. Fink. Plaintiff's own expert was far from conclusive regarding the presence of objective signs of injury, and Dr. Fink directly stated that there had been no objective confirmation. Both Plaintiff and Defendant presented expert medical opinions that depended upon Plaintiff's representations to establish causation. The jury therefore remained entitled to reject Plaintiff's subjective contentions and, by extension, the expert medical testimony that substantially relied upon them. Because the jury could permissibly and reasonably conclude that Defendant did not proximately cause injury to Plaintiff, the Court finds that the defense verdict was not against the great weight of the evidence.

B. Defendant's Motion for Costs

Having concluded that Plaintiff's Motion for a New Trial must be denied, the Court turns to Defendant's Motion for Costs. Defendant alleges that Plaintiff rejected a pre-trial offer of judgment and refused to accept an arbitration award. Defendant's motion requests reimbursements in the following amounts: (1) $2,000 for Dr. Fink's expert witness testimony fee;

(2) $100 for the arbitration fee.[35] Plaintiff has not filed a response to Defendant's Motion for Costs.

1. Expert Witness Testimony Fee

Superior Court Civil Rule 68 requires the Court to impose costs against a party that has rejected an offer of judgment if the final judgment was not more favorable to the offeree than the offer.[36] The party seeking costs must show that an offer of judgment was filed at least ten days prior to trial and that the costs sought were incurred after the filing of the offer.[37]

Under Superior Court Civil Rule 54(d) and 10 *Del. C.* § 8906, a prevailing party may recover expert witness testimony fees to an amount fixed in this Court's discretion. The prevailing party may only recover fees associated with time spent testifying or waiting to testify, along with reasonable travel expenses.[38]

The record shows that Defendant filed an offer of judgment for $9,000 on August 13, 2008, more than ten days before trial.[39] The only cost

[35] Docket 39, ¶ 5.

[36] *See Bond v. Yi*, 2006 WL 2329364, at *1 (Del. Super. Aug. 10, 2006).

[37] *Id.*

[38] *Spencer v. Wal-Mart Stores East, LP*, 2007 WL 4577579, at *1 (Del. Super. Dec. 5, 2007).

[39] Docket 39 (Def.'s Mot. for Costs), Ex. A (Offer of Judgment).

requested pursuant to Rule 68 is Dr. Fink's $2,000 fee for time spent waiting to testify and offering testimony at trial on September 8, 2008. Defendant's motion states that Dr. Fink was prepared to testify at 2:00 P.M. on the day of trial and was dismissed approximately an hour and fifteen minutes later.[40]

In assessing the reasonableness of medical experts' testimonial fees, this Court has frequently relied upon rates set forth in a 1995 study conducted by the Medical Society of Delaware's Medico-Legal Affairs Committee, as adjusted to reflect increases in the consumer price index for medical care.[41] The Medico-Legal Study reported that fees for a half-day of medical expert testimony ranged from $1,300 to $1,800.[42] The Court finds that there has been an increase of 48.9% in the consumer price index for medical care from the beginning of 1996 to August, 2008.[43] Therefore, the applicable range of reasonable half-day testimony fees would be $1,935.70 to $2,680.20.

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[40] *Id*.

[41] *See Bond*, 2006 WL 2329364, at *3 (collecting cases); *Gates v. Texaco, Inc.*, 2008 WL 1952164, at *1 (Del. Super. Mar. 20, 2008).

[42] *See Gates*, 2008 WL 1952164, at *1.

[43] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Archived News Releases for Consumer Price Index*, *available at* http://www.bls.gov/schedule/archives/cpi_nr.htm (last visited Oct. 15, 2008).

The Court can reasonably assume that Dr. Fink's $2,000 fee includes some additional time spent traveling and waiting to testify. The fee is well below the "upper reaches" of reasonable charges for a half day and appears reasonably in line with the price-adjusted rates given by the Medico-Legal Study. Defendant's motion will therefore be granted as to Dr. Fink's $2,000 expert testimony fee.

2. Arbitrator's Fee

Former Rule 16.1, applicable to this action, states that "[i]f the party who demands a trial *de novo* fails to obtain a verdict from the jury or judgment from the Court . . . more favorable to the party than the arbitrator's order, that party shall be assessed the costs of the arbitration, and the ADR Practitioner's total compensation."[44] Here, the record shows that following the arbitrator's decision, Plaintiff filed a demand for a trial *de novo*.[45] The arbitrator's decision awarding Plaintiff $7,500 was more favorable than the defense verdict rendered by the jury.[46] Defendant's motion for costs is therefore granted as to the $100 arbitration fee.

[44] Super. Ct. Civ. R. 16.1(k)(11)(D)(iii) (2007), *repealed by* Order Amending Civil Rule 16 & Repealing Civil Rule 16.1 (Del. Super. Feb. 5, 2008) (effective in civil actions filed after Mar. 1, 2008).

[45] *See* Docket 11.

[46] *See* Docket 9.

VI. Conclusion

For the foregoing reasons, the Court cannot find that the verdict in the case was against the great weight of the evidence. Plaintiff's Motion for a New Trial is **DENIED.** Defendant's Motion for Costs in the amount of $2,100, reflecting $2,000 for expert medical witness testimony fees and $100 for arbitration fees, is **GRANTED.**

IT IS SO ORDERED.

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Peggy L. Ableman, Judge