

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

Jennifer Cuffy )  
 )  
 Plaintiff, )  
 )  
 v. ) C.A. No. 08C-04-055 JAP  
 )  
 Alan Krusheski )  
 )  
 Defendant. )  
 )

Submitted: July 13, 2009  
Decided: August 06, 2009

**MEMORANDUM OPINION DENYING MOTION FOR NEW  
TRIAL AND GRANTING ADDITUR**

Leo J. Boyle, Esquire, Wilmington, Delaware – Attorney for  
Plaintiff

Anthony N. Forcina Jr., Esquire, Wilmington, Delaware –  
Attorney for Defendant.

The Defendant in this rear end motor vehicle accident case conceded liability, but after a trial on damages the jury returned a zero verdict. Plaintiff now seeks a new trial or an additur. For the reasons that follow, the Court denies Plaintiff's motion for a new trial but grants an additur of \$3000.

The basis for Plaintiff's motion is not entirely clear. At times it appears that she is contending that the jury's determination that she did not suffer permanent debilitating injuries as a result of the accident is against the great weight of the evidence. At other times it seems as if she is arguing that she is entitled to an additur or a new trial because of the purportedly undisputed fact that she suffered a temporary muscle strain as a result of the accident. The Court will assume she is raising both arguments.

*A. The jury's determination that Plaintiff did not suffer permanent debilitating injuries is not against the great weight of the evidence*

When reviewing a motion for new trial, the trial judge must give the jury's verdict "enormous deference."<sup>1</sup> In the absence of exceptional circumstances, the validity of damages determined by the jury should be presumed.<sup>2</sup> A court will not set aside a jury's verdict unless "the

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<sup>1</sup> *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997).

<sup>2</sup> *Id.*

evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result.”<sup>3</sup>

Here the evidence does not preponderate heavily against the Defendant. To the contrary, defendant presented persuasive evidence that Plaintiff suffered no traumatic injury beyond a temporary muscular strain. He called as an expert witness Robert Gordon, M.D. whose credentials were impressive—he graduated from Yale Medical School, is a board certified orthopedic surgeon and was a clinical professor of orthopedic surgery at Georgetown University Medical School. Dr. Gordon testified without equivocation that Plaintiff suffered no injury, other than perhaps a temporary muscle strain, as a result of the accident.

Dr. Gordon performed a physical examination of Plaintiff which showed that there was no anatomical basis for Plaintiff’s subjective complaints of pain. During the examination Ms. Cuffy performed a straight leg raising test in which her leg was straightened to a 90 degree angle with her body while she was seated on the examining table. The test is designed to stretch the sciatic nerve. When the test was performed, Ms. Cuffy denied having any pain or discomfort. Later during the examination Dr. Gordon performed the same maneuver except that Ms. Cuffy was lying down. This time Ms. Cuffy “would barely allow me to raise either leg off the table before complaining of pain in her back.” According to Dr. Gordon, the absence of pain during the leg straightening

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<sup>3</sup> *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

test while seated means there cannot be an anatomical reason for Ms. Cuffy's immediate complaints of pain while performing the same test lying down.

Dr. Gordon pointed to a second inconsistency which appeared during his physical examination. In another test Dr. Gordon simultaneously bent Ms. Cuffy's knee and hip. According to Dr. Gordon, from an anatomical perspective this maneuver should improve her condition, yet Plaintiff claimed it increased her pain. Ms. Cuffy's response to this test had no anatomical basis. As did the straight leg raising test, this test led Dr. Gordon to believe that her complaints were not grounded on any injury from the accident. Notably Plaintiff offered no expert testimony to rebut the conclusions Dr. Gordon drew from his examination of her. Dr. Gordon<sup>4</sup> found no objective evidence of injury attributable to the accident on Plaintiff's MRIs. The bony tissue in Plaintiff's neck and spine contained a disk osteophyte complex, but this condition is caused by ordinary wear and tear and is common in anyone of Ms. Cuffy's age.

In sum, in light of Dr. Gordon's testimony, the Court cannot say that the jury's finding that Ms. Cuffy did not suffer any substantial injury as a result of the accident is against the great weight of the evidence.

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<sup>4</sup> Dr. Gordon spent years teaching medical students at Georgetown Medical School how to read MRIs. His credentials were not challenged by Plaintiff.

*B. The Court grants Plaintiff's application for additur to compensate her for her injuries conceded to be attributable to the accident*

At trial Dr. Gordon testified that “any injuries that occurred in this accident were the muscular strains that were initially diagnosed [at the emergency room].” Plaintiff argues that she is entitled, at a minimum, to damages for her muscular strain. In *Walker v. Campinelli*,<sup>5</sup> however, the Supreme Court upheld a zero verdict despite the fact that “[a]t trial, both defense experts at least initially agreed that [Plaintiff] had suffered some degree of injury as a result of the accident.”<sup>6</sup> In *Walker* the defendant’s expert’s conclusions were based solely upon the plaintiff’s subjective complaints of pain which subjective complaints, the court reasoned, the jury was free to discredit. The Supreme Court further noted:

Where uncontested medical evidence links an injury to its proximate cause and is confirmed by independent objective testing, a jury award of zero damages is against the weight of the evidence. The law, however, does not compensate for every loss and the jury serves as the conscience of the community, sending a message to exaggerating and overly litigious claimants.<sup>7</sup>

*Walker* thus turns on whether there is objective evidence, other than the plaintiff’s subjective complaints, to support a finding of a substantial injury. If so, a zero verdict is against the weight of the evidence; if not, a zero verdict will be sustained.

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<sup>5</sup> 2004 W.L. 2419104 (Del. Oct. 12, 2004).

<sup>6</sup> *Id.* at \*3.

<sup>7</sup> *Id.* at \*2.

This is a close case, and the Court has seriously considered upholding the jury's zero verdict in its entirety. Dr. Gordon did not testify that he relied exclusively upon Ms. Cuffy's subjective complaints when he concluded that she suffered only a temporary muscle strain, nor can it be inferred from his testimony that Plaintiff's complaints were the sole basis for his conclusion. Rather, he also relied upon the Emergency Room records and films:

She said she was seen at a local emergency room and – and where she said that she was told she had a muscle strain, which I indicated after reviewing all all of her records and films and examining her, I believe was the correct diagnosis.

The briefs do not address whether the E.R. records and films reflect any objective manifestations of muscle strain. Still, the gist Dr. Gordon's testimony is that he relied upon *something* other than Ms. Cuffy's subjective complaints. The Court therefore concludes that *Walker* is inapplicable here.

The Court will enter an additur to compensate Ms. Cuffy for her temporary muscle strain. In determining the amount of the additur the Court has considered that the injury lasted only a few weeks and did not require drastic medical or surgical intervention.<sup>8</sup> The Court therefore grants an additur of \$3000.<sup>9</sup> Should Defendant not accept that additur,

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<sup>8</sup> The Court has not considered the cost incurred by Ms. Duffy for such treatment. In an earlier letter opinion in this matter the Court denied any claim for reimbursement of medical expenses.

<sup>9</sup> In her motion Plaintiff repeatedly refers to a stipulation that \$11,027.40 in medical bills beyond PIP which were incurred by her. It is not entirely clear whether these

the Court will grant Plaintiff a new trial on damages for her muscle strain.

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John A. Parkins, Jr.  
Superior Court Judge

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references are intended to justify a new trial or if they are offered to suggest the amount of an additur. In either event, that stipulation is of no assistance to Plaintiff. In that stipulation Defendant expressly disavowed any agreement that the expenses were incurred as a proximate result of the accident. The jury awarded zero for medical expenses, thus necessarily finding that those expenses were not caused by the accident.