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

AARON L. HUTT, SR.,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 06C-06-196-MMJ
	)	
v.	)	
	)	
	)	
JOHN C. KUMPEL,	)	
	)	
Defendant.	)	

Submitted: August 10, 2009
Decided: November 12, 2009

On Plaintiff Aaron Hutt's Motion for New Trial

DENIED

MEMORANDUM OPINION

Joseph J. Rhoades, Esquire, Wilmington, Delaware, Attorney for Plaintiff Aaron Hutt

Nancy C. Cobb, Esquire, Wilmington, Delaware, Attorney for Defendant John Kumpel

JOHNSTON, J.

A pedestrian was hit by a car driven by the defendant. The jury awarded plaintiff $31,000.00, reduced by 35% due to plaintiff's comparative fault. Plaintiff filed a Motion for New Trial. Defendant submitted a Response. Although defendant failed to object to impermissible lay opinion testimony at the time that testimony was elicited, the Court provided the jury with a curative instruction regarding the impermissible statement. This curative instruction reasonably informed the jury of the law and did not mislead the jurors or undermine their ability to perform their duty. Plaintiff's Motion for New Trial must be denied.

FACTUAL CONTEXT

On the morning of October 29, 2004, plaintiff Aaron Hutt was walking eastbound in the grass on Water Street in Newport, Delaware. About 500 feet from the intersection of Water Street and Copper Drive, the side view mirror of a Saturn driven by defendant John Kumpel hit Hutt's left hand and hip as Kumpel drove past. Immediately following the accident, Kumpel pulled over to the side of the road, apparently unaware that he had hit a pedestrian. Shortly thereafter, Kumpel drove away. Hutt followed

Kumpel and confronted him a short distance later. Hutt and Kumpel waited until a police officer arrived.

Master Corporal Mark Wohner of the Newport Police Department responded to the scene approximately seven minutes after the initial accident. He testified that Hutt and Kumpel had engaged in a verbal altercation over the accident. He was unable to recall any mention of a physical altercation. Dr. Errol Ger, an expert witness for the defense, examined Hutt following the accident. Dr. Ger testified that during the examination, Hutt stated that he had "grabbed [Kumpel] and [thrown] him to the ground [in order to] keep him on the ground until [Kumpel] promised not to leave . . . ."

Hutt sued Kumpel for negligence. Trial began on June 15, 2009. Because of scheduling reasons, Master Corporal Wohner was unable to testify at trial. The parties agreed to videotape his testimony on June 10, 2009 and play the recording to the jury. According to Kumpel's response to Hutt's Motion for New Trial, the parties agreed that Corp. Wohner would not be permitted to give opinion testimony as to the cause of the accident and Hutt's subsequent injuries.

On the first day of trial, counsel for plaintiff provided defense counsel with a copy of "Plaintiff's Updated Answers to Defendants' Interrogatories"

wherein Hutt identified Corp. Wohner as an expert. Prior to the commencement of trial, the parties agreed to eliminate one question which elicited opinion testimony from Corp. Wohner.[1] However, a second question calling for opinion testimony was not eliminated and was not objected to during the deposition, before trial, or when presented to the jury.[2]

During closing, Hutt's counsel indicated that Corp. Wohner "issued no citation. [Hutt] did nothing to cause or contribute to the accident." The defense did not object. During plaintiff's rebuttal, Hutt's counsel again reiterated Corp. Wohner's testimony that there was nothing Hutt did to cause or contribute to the accident.

At the end of closing arguments, defense counsel moved for a mistrial. The defense argued that it was "impermissible to comment upon the officer's opinion as to the cause of the accident. In fact . . . [plaintiff's counsel] withdrew that portion of the officer's deposition in which those questions were asked." Hutt's counsel countered that the question was

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[1] Q: Sir, just to reiterate, after you investigated the incident and interviewed Mr. Kumpel and Mr. Hutt, what conclusion did you draw about the primary contributing circumstance of the accident?

A: The primary contributing circumstance is, that I have listed is failure to yield the right-of-way. And my conclusions were that because the location of the mirror on the side of the road and the statement of the driver where he states that he never saw the pedestrian, I felt that he more than likely drifted over and struck the pedestrian.

[2] Q: Okay. Is there anything in your report which indicates that Mr. Hutt did anything to cause or contribute to the accident?

A. No.

asked and answered without objection and that Corp. Wohner had been identified as an expert who is permitted to provide opinion testimony.

The Court stated that whether a police officer charged one of the parties with a motor vehicle violation may be relevant, but any finding of negligence is within the sole province of the jury. The Court resolved to cure any improper inferences by providing the jury with a curative regarding the determination of negligence.[3] Counsel for plaintiff objected to the curative.

Subsequently, the Court gave the following curative instruction: "A police officer is not qualified to decide whether either party was negligent, and a police officer is not qualified to determine whether or not the negligence proximately caused the injury. There is one exception to that, and I will read you an instruction to that effect." Other instructions informed the jurors: that negligence, causation, and other factual issues were determinations solely within their province, based on the evidence presented during trial; and that they must consider the testimony of a police officer in the same manner as the testimony of any other witness.

[3] The Court: "Well, I do think that whether or not the police officer charges someone may be relevant. Obviously, we have the negligence as a matter of law instruction. But in this case what I would propose to do in the form of a curative is to say to the jury that it is not up to the police officer to determine what caused the injury. That's up to them to decide within their sole province. They may consider the police officer's testimony in the same way they consider any other evidence, but it is their decision as to whether or not there was negligence and whether or not that negligence proximately caused the injury."

The jury ultimately returned a verdict for plaintiff in the amount of $31,000. That award was reduced by 35% due to plaintiff's comparative negligence. Plaintiff now moves for a new trial.

In his motion, Hutt argues that, because of defense counsel's failure to object, the Court's curative instruction may have called into question Corp. Wohner's ability to investigate an accident, draw conclusions from that investigation and testify to those conclusions. Hutt argues that the curative allowed the jury to disregard or marginalize Corp. Wohner's testimony. He states that defense counsel's failure to object to the statement, either when asked or when played to the jury, waived the issue and the resulting curative prevented plaintiff's counsel an opportunity to tailor his comments to the jury to avoid any objectionable statements.

Kumpel argues that the pre-trial agreement was intended to exclude all impermissible lay testimony on proximate causation and Hutt's argument rests on a semantic distinction between "cause or contribute" and "primary contributing circumstance." Kumpel also argues that there is no ground for a new trial because the Court's instruction neither misstated the law, nor misled or confused the jury.

OVERTURNING THE JURY'S VERDICT

Standard of Review

A jury's verdict is presumed to be correct.[4] This presumption reflects the significant deference given to the jury's role as the finder of fact.[5] Barring exceptional circumstances, the Court will 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, [6] or when it is clear that the verdict is a result of passion, prejudice, partiality or corruption.[7]

Analysis

Plaintiff has not alleged that the jury's verdict is against the weight of the evidence, or a result of passion, prejudice, partiality, or corruption.

Kumpel presented sufficient evidence to allow the jury to find that Hutt's injuries were the result, at least in part, of Hutt's own actions.[8] From the evidence presented at trial, the jury reasonably concluded that Hutt's injuries were caused, in part, from the impact of defendant's car with

[4] *Dunn v. Riley*, 864 A.2d 905, 906 (Del. 2004).
[5] *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997); *Caldwell v. White*, 2005 WL 1950902, at *3 (Del. Super.); *Parker v. Parker*, 2009 WL 3338098, at *1 (Del. Super.).
[6] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).
[7] *Riegel v. Aastad*, 272 A.2d 715, 717-18 (Del. 1970).
[8] Dr. Errol Ger: "From a review of [plaintiff's] history and review of the records it appears that his current difficulties are related to the time of the accident. It is possible that the [plaintiff's] shoulder problem arose at the time of impact from [defendant's] car. It is also possible that the shoulder problem arose as a result of the altercation or scuffle . . . ."

plaintiff's left hand and hip and, in part, from a subsequent altercation between defendant and plaintiff.

Corp. Wohner testified that when he arrived at the accident scene, he observed a grey Saturn with a missing side-view mirror. He stated that, somewhere around the location of the alleged impact, he observed fragments of that side-view mirror. Corp. Wohner also testified that plaintiff identified defendant as the driver of the vehicle that hit him.

Although Corp. Wohner did not recall any statements by either party regarding a physical altercation, Dr. Ger testified regarding Hutt's statements that he grabbed defendant and threw him to the ground. Dr. Ger opined that this altercation may have contributed to Hutt's injuries.

In light of this evidence, the Court cannot conclude that the jury's verdict was against the weight of evidence or the result of passion, prejudice, partiality, or corruption.

CURATIVE ISNTRUCTION

Standard of Review

The prejudice of an objectionable question, or an improper comment by counsel, must be measured in the trial setting.[9] The Court will not order

[9] *Koutoufaris v. Dick*, 604 A.2d 390, 400 (Del. 1992).

a new trial unless the question or comment introduces an "indelible inference which taints the fairness of the trial."[10] A proper curative instruction will usually remedy an improper question or comment.[11] A jury instruction may not be the basis for reversible error if, when read as a whole, it is reasonably informative, does not mislead the jury or undermine the jurors' ability to intelligently perform their duty.[12]

Analysis

Generally, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."[13] Delaware Rule of Evidence 701 provides that for those witnesses who have not been qualified as experts:

> The witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Rule 702 states that a witness qualified by knowledge, skill, experience, training or education may testify if: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable

[10] *Id.*
[11] *Id.*
[12] *Id*. at 399 (citing *Sirmans v. Penn*, 588 A.2d 1103 (1991)).
[13] D.R.E. 602.

principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[14]

Corp. Wohner's testimony that Hutt did nothing to cause or contribute to the accident was not based on any personal knowledge of the matter. No evidence suggests that Corp. Wohner personally witnessed the accident or the subsequent altercation. As a result, he could not reach a conclusion, from what he observed, that Hutt did not cause or contribute to the accident. That conclusion is for the jury.[15]

Further, there is no evidence to suggest that Corp. Wohner's conclusions were based on any principles or methods, as prerequisite to expert testimony. Plaintiff has introduced no evidence regarding Corp. Wohner's methodology, only that he had training on "how to investigate traffic accidents," and that he investigated "approximately between 30 and 40" accidents per year.

Because plaintiff's counsel elicited inadmissible expert testimony, a curative instruction was the appropriate remedy. Defendant's failure to make a contemporaneous objection, under these specific circumstances, does not operate as a waiver of defendant's subsequent objection, and does not alter the Court's conclusion.

[14] D.R.E. 702.
[15] *See Seward v. State*, 723 A.2d 365, 373 n. 23 (Del. 1999) ("If the jury can be put into a position of equal vantage with the witness for drawing the opinion, then the witness may not give an opinion.").

The Court instructed the jury that a "police officer is not qualified to decide whether either party was negligent, and a police officer is not qualified to determine whether or not the negligence proximately caused the injury." In *Alexander v. Cahill,* the Delaware Supreme Court held that a state trooper's testimony attributing the cause of an automobile accident to the defendant motorists was an inadmissible lay opinion.[16] The Supreme Court found that a police officer, who has not been qualified to provide expert opinion testimony, cannot testify as to the cause of an accident.[17]

In this case, the Court's curative instruction was a correct statement of the law. There is nothing to suggest that the instruction misled the jury or undermined its ability to perform its duty. When viewed in light of all of the instructions, the specific curative instruction did not call into question Corp. Wohner's ability to investigate the accident or to draw conclusions based upon that investigation.

CONCLUSION

The jury's verdict was not manifestly or palpably against the weight of the evidence. Any possible prejudice was remedied by the Court's

[16] 829 A.2d 117, 121-22 (Del. 2003).
[17] *Id.*

curative instruction. The instruction did not undermine the police officer's otherwise admissible testimony.

THEREFORE, plaintiff Aaron Hutt's Motion for New Trial is hereby **DENIED**.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston