

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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***Re: Kiesha Khader v. Mohamed Khalil Khader and Daniel
Joseph Young***
C.A. No. 08C-06-029 RRC

Submitted: April 16, 2010
Decided: June 7, 2010
Revised: June 8, 2010

Upon Plaintiff's Motion for New Trial.
DENIED.

Dear Counsel:

INTRODUCTION

This motion for new trial stems from an automobile accident that occurred on October 30, 2006. Plaintiff was allegedly injured when a vehicle driven by Defendant Khader, in which Plaintiff was a passenger, was

struck by a vehicle driven by Defendant Young.¹ After the accident, Plaintiff was taken to St. Francis Emergency Room by ambulance and diagnosed with back spasms in the right side of her neck.² Plaintiff was also diagnosed with neck and low back injuries requiring continued medical treatment.³

Trial commenced on November 13, 2009. Plaintiff presented the medical records from her emergency room visit, which established the occurrence of back spasms.⁴ Additionally, Plaintiff produced uncontradicted testimony from Dr. Craig D. Sternberg, who testified that Plaintiff's back injuries and spasms were causally related to the automobile accident.⁵ He also testified that Plaintiff's physical exam on November 6, 2006 showed "tightness in her cervical region, as well as spasm."⁶ Defendant did not produce any expert medical testimony on causation.

The jury ultimately found that Defendants Khader and Young were negligent but that their conduct was not the proximate cause of Plaintiff's injuries. Thus, the jury awarded no damages.

The only issue before the Court in this present motion for new trial is whether the jury's award of zero damages was against the "great weight of the evidence" because Plaintiff produced objective evidence (back spasms) of her injury and also produced uncontradicted expert medical testimony attributing the cause of her injury to the automobile accident.

For the following reasons, this Court holds that the jury's award of zero damages cannot stand. Plaintiff produced expert medical testimony and objective evidence demonstrating that the cause of her injury was the automobile collision. The jury was required to award at least minimal damages. However, because this Court concludes that additur is a potential remedy under the circumstances, Plaintiff's motion for new trial, at the moment, is **DENIED**.

FACTS and PROCEDURAL HISTORY

On October 30, 2006, Plaintiff was involved in an automobile accident that occurred in Newport.⁷ Plaintiff was a passenger in Defendant

¹ Dkt. 1.

² Mot. for New Trial at ¶ 2.

³ *Id.*

⁴ *Id.* at Ex. A.

⁵ *Id.* at ¶ 4.

⁶ *Id.* at ¶ 3.

⁷ Dkt. 1.

Khader's automobile that was struck by Defendant Young as it was exiting an Exxon gas station.⁸ Immediately after the accident, Plaintiff was transported to the hospital and diagnosed with neck spasms as well as low back injuries.

On November 6, 2006, Plaintiff began a course of treatment with Dr. Craig Sternberg, M.D.⁹ Dr. Sternberg noted "tightness in [Plaintiff's] cervical region, as well as spasms."¹⁰ He also noted "sharp" pain in Plaintiff right side and "tingling and numbness going into the hands"¹¹ Both parties agree that Dr. Sternberg made "objective findings" of injury.¹²

At trial, Plaintiff called Dr. Sternberg as an expert witness, and he testified within a reasonable degree of medical probability that Plaintiff's injuries were caused by the automobile accident.¹³ Dr. Sternberg also testified that he observed back spasms. Defendant presented no expert medical testimony to contradict Dr. Sternberg's opinion on causation.

Despite Dr. Sternberg's expert medical opinion, Defendant produced evidence that Plaintiff had prior injuries, which she never disclosed to Dr. Sternberg.¹⁴ Thus, Dr. Sternberg issued his expert report attributing causation to the accident without any knowledge of the fact that Plaintiff had prior injuries to her back.¹⁵ Dr. Sternberg also testified that Plaintiff routinely failed to attend therapy as required and stopped treating with him altogether after April 7, 2008.¹⁶

The jury ultimately found that Defendants Khader and Young were negligent but that their conduct was not the proximate cause of Plaintiff's injuries. Plaintiff did not recover any damages as a result of the verdict.¹⁷

⁸ *Id.*

⁹ Plaintiff never indicated to Dr. Sternberg that she had any prior injuries to her low back or neck on her initial patient intake form.

¹⁰ Mot. for New Trial at ¶ 3.

¹¹ *Id.* at Ex. B.

¹² Def. Young Feb. 12, 2010 Letter ("Defendant Young concedes that Dr. Sternberg made some objective findings of injury.").

¹³ Mot. for New Trial at Ex. H.

¹⁴ Def. Ans. to Mot. for New Trial at ¶ 5.

¹⁵ Dr. Sternberg testified that his review of Plaintiff's records showed that Plaintiff had treated approximately three times for lower back pain. Dr. Sternberg testified that those records did not change his opinion on causation. Reply Br. Ex. D 31-72.

¹⁶ Def. Ans. to Mot. for New Trial at ¶ 5.

¹⁷ After Plaintiff filed this motion for new trial, Plaintiff settled her claim against Defendant Khader. Thus, Defendant Young is the only remaining party in this case.

PARTIES' CONTENTIONS

Plaintiff has now moved for a new trial arguing that the jury award of zero damages was against the great weight of the evidence. In support of her argument, Plaintiff argues that the uncontradicted testimony and objective findings of Dr. Sternberg required the jury to award some damages. Specifically, Plaintiff asserts that “[t]here is no evidence that she had any prior neck problems, injury, or neck pain prior to the collision at issue.”¹⁸ Although Plaintiff admits that she had “brief instances of low back pain[,]”¹⁹ she argues that the objective findings (back spasms) observed by the emergency room doctors immediately after the accident, and by Dr. Sternberg several weeks later, required the jury to award at least some damages.²⁰ As an alternative to a new trial, Plaintiff requests additur.²¹

In response, Defendant argues that it is the jury’s function to assess credibility.²² Defendant asserts that “the jury had superior knowledge regarding Plaintiff’s credibility than did Dr. Sternberg. That is, the jury was exposed to plaintiff’s inconsistent sworn testimony as well as her prior injuries.”²³ Defendant argues that the jury was free to award no damages to Plaintiff because Plaintiff “misled” Dr. Sternberg, and Dr. Sternberg ultimately based his expert report on Plaintiff’s false representations.²⁴

STANDARD OF REVIEW

In a motion for new trial, this Court must determine whether the jury’s verdict is against the great weight of the evidence. Although “[a] jury’s verdict is presumed to be correct[,]”²⁵ the verdict will be set aside if the verdict “is a result of a passion, prejudice, partiality or corruption or it is clear the jury disregarded the evidence.”²⁶ Even though this Court will give great deference to a jury’s verdict, “[z]ero verdicts . . . are special.”²⁷

¹⁸ Mot. for New Trial at ¶ 7.

¹⁹ *Id.*

²⁰ *Id.* at ¶ 10.

²¹ Reply Br. at ¶ 9.

²² Def. Ans. to Mot. for New Trial at ¶ 5.

²³ *Id.*

²⁴ *Id.*

²⁵ *Novak v. Erschen*, 2009 WL 1910947, at * 3 (Del. Super.).

²⁶ *Id.* (citing *Riegel v. Aastad*, 272 A.2d 715, 717-18 (Del. 1970).

²⁷ *Sullivan v. Sanderson*, 2002 WL 1162305, at * 2 (Del. Super.), *reversed on other grounds* by 2002 WL 31883036 (Del. Supr.).

DISCUSSION

The only issue presented by this motion for new trial is whether the jury's award of zero damages was against the "great weight of the evidence" because Plaintiff produced objective evidence (back spasms) of her injury and also produced uncontradicted expert medical testimony attributing the cause of her injury to the automobile accident.

If Plaintiff can prove both negligence and causation, Plaintiff is entitled to damages.²⁸ Negligence is not in dispute because the jury found Defendants negligent. However, despite the uncontradicted testimony of Dr. Sternberg, the jury found a lack of causation.

Although Plaintiff never moved for a directed verdict on this issue at any point during the trial, never asked that the jury be directed to render some award, and consented to the verdict form giving the jury an option to return a zero verdict,²⁹ numerous Delaware cases have held "that unrebutted medial opinion supported by objective tests is conclusive [to establish causation]."³⁰ Here, Plaintiff produced the unrebutted expert medical opinion of Dr. Sternberg stating that Plaintiff's injuries were caused by her automobile accident. Dr. Sternberg testified that his findings were based on objective findings of back spasms.³¹ Under Delaware case law, Dr. Sternberg's unrebutted medical opinion supported by his objective findings of backs spasms conclusively established causation.³² Thus, the jury was required to award at least a minimal amount of damages.

²⁸ See *Amalfitano v. Baker*, 794 A.2d 575, 577 (Del. 2001).

²⁹ Despite Plaintiff's failure to move for a directed verdict, and in spite of Plaintiff's consenting to the verdict form giving the jury the option to award zero damages, Plaintiff has not waived her right to move for a new trial. *Willey v. McCormick*, 2003 WL 22803925, at * 3 (Del. Super.) (granting a motion for new trial even though "[Defendant] contend[ed] that by agreeing to [jury] instructions and the jury interrogatory, the plaintiff ha[d] waived any objection to the jury's 'no' answer to the interrogatory.").

³⁰ *Willey*, 2003 WL 22803925, at * 3; see also *Amalfitano*, 794 A.2d at 577 (stating that "a verdict of zero damages is inadequate and unacceptable as a matter of law where uncontradicted medical testimony establishes a causal link between an accident and injuries sustained."); *Maier v. Santucci*, 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 . . .").

³¹ *Willey*, 2003 WL 22803925, at * 3 (stating that "a doctor's findings of spasms reflects objective testing.") (citations omitted).

³² *Amalfitano*, 794 A.2d at 577. ("We hold . . . that uncontradicted medical evidence of injuries and their proximate cause, confirmed by independent objective testing, meet the

Although Defendant Young argues that the jury was free to assess the credibility of witnesses and reject Dr. Sternberg's expert opinion if the jury ultimately found that opinion unsupported by credible evidence, this argument is without merit,³³ and Defendant cites no authority in support of this argument. Plaintiff met her burden of producing an un rebutted expert opinion supported by objective evidence, and the jury was required to award at least minimal damages.³⁴

This Court finally notes that this is an appropriate case to grant additur.³⁵ Here, the Court concludes that an award of \$3,500 is appropriate. Plaintiff did not tell her treating physician about her prior injuries and concealed her prior injuries at the arbitration hearing. She also did not actively engage in medical treatments prescribed by Dr. Sternberg. She routinely missed appointments, and Dr. Sternberg himself stated that "she did not attend therapy as regularly as I would have liked."³⁶ Plaintiff apparently stopped treating altogether as of April 7, 2008.

In light of all of these circumstances, this Court believes that \$3,500 is the total amount of appropriate additur, and Defendant Young shall contribute \$500.³⁷ Defendant shall inform the Court of her decision by June 28, 2010. If Defendant refuses to accept additur, a new trial is granted. If Defendant accepts the additur, the zero verdict is set aside and a verdict of \$3,500 entered. The motion for new trial is, at the moment, **DENIED**, subject to the above.

IT IS SO ORDERED.

Very truly yours,

Richard R. Cooch

cc: Prothonotary

standard of "conclusive" evidence of injury that would require a reasonable jury to return a verdict for at least minimal damages.").

³³ See *Willey*, 2003 WL 22803925, at * 3 (granting a motion for new trial even though the defendant argued that "proximate causation is ordinarily a question of fact for the jury" and "inconsistencies" in testimony should preclude a conclusive finding of causation.); see also *Amalfitano*, 794 A.2d at 577.

³⁴ *Amalfitano*, 794 A.2d at 577

³⁵ See *Novak v. Erschen*, 2009 WL 1910947, at * 3 (Del. Super.) (granting additur in a case with facts very similar to the facts the present case).

³⁶ Def. Ans. to Mot. for New Trial at ¶ 5.

³⁷ The Court was recently informed that Defendant Khader settled for \$3,000. This \$3,000 settlement is used to calculate the total amount owed by Defendant Young.