SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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Re: ***Parisi v. State Farm Mutual Automobile Insurance Co.***
C.A. No. S09C-10-015 RFS

Upon Plaintiffs' Motion for a New Trial. Granted.

Submitted: October 13, 2010
Decided: October 18, 2010

Dear Counsel:

I have reviewed the motion of Donna Parisi and Anthony Parisi ("Plaintiffs") for a new trial as well as the Defendant's response. The issue is whether or not the zero verdicts can be lawfully sustained given great deference to the jury's decision.[1]

In this case, Plaintiffs sued State Farm Insurance Company ("State Farm") for

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[1] *Hedenberg v. Best,* 2005 WL 1953038 at *1 (Del. Super. July 11, 2005).

underinsurance coverage. Donna Parisi ("Donna") received a policy limits settlement from a tortfeasor who crashed into her vehicle.

State Farm admitted liability and admitted that Donna had sustained injuries. It contested the amount, nature, and extent of her injuries. Donna has a severe pre-existing condition for degenerative/rheumatoid arthritis. These are destructive conditions of her joints and bones. Because of their debilitating effects, she receives disability from the Social Security Administration.

The jury was instructed about the nature of an underinsured motorist claim. The jury was told that State Farm admitted liability and damages but questioned their scope. Question No. 1 of the verdict sheet dealt with Donna's claim for damages and it asked: "(1) What amount of damages do you find were suffered by Donna Parisi as a proximate result of the September 4, 2006 accident, without deduction for any monies that she has already received?" Question No. 2 involved Anthony's loss of consortium claim and it asked: "(2) What amount of damages do you find were suffered by Anthony Parisi, if any, as a proximate result of the September 4, 2006 accident, without deduction for any monies that he has already received?"

The case was presented to the jury on the basis of admitted liability and for some level of damages. Counsel advised the jury that its verdict would be for 100% of the damages resulting from the rear end crash. The jurors were told that the Court would subtract the settlement for a figure.

Two physicians presented medical evidence by trial deposition. Donna was referred by her family physician to Dr. Harry Freedman, an orthopedic surgeon. Freedman treated Donna from September 21, 2006 through November of 2008. He opined that Donna suffered injuries to her neck and lower back along with contusions, a split lip and chest bruising. He felt Donna sustained a permanent injury. Freedman also reported muscle spasms by several of his physical examinations. These are objective findings beyond the control of a patient.[2] He increased the dosages of pain medication beyond what was required for her earlier problems as the level of her pain increased.

On the other hand, Dr. Ronald Sabbagh, an orthopedic surgeon retained by the defense, opined that Donna suffered injuries to her hip, leg, neck, and lip. Further, Sabbagh opined that Donna suffered a lumbar strain that could be called a contusion. The accident caused injury to the soft tissues, the muscles and the ligaments of the lumbar spine. Sabbagh noted that the medical records indicated spasms. He acknowledged these are objective signs of injury of muscle tightness. Donna's complaints about pain were subjective in nature. He felt the injuries were temporary but not permanent. Sabbagh disputed Freedman's finding of cervical injury. Both physicians opined that the accident aggravated her pre-existing condition by causing additional pain. Sabbagh felt her medical treatment was reasonable and necessary and was directly related to the accident. The treatment primarily involved Freedman's efforts over two years to lessen her pain.

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[2] *Id.* at *2.

All the opinions were given to a reasonable degree of medical probability.

Consequently, the jury was free to decide if Donna suffered temporary or permanent injuries. The question whether or not Donna suffered cervical strain was fair game. Donna reported neck pain in support of her disability application before the accident. On October 22, 2009, she told Dr. Miriam Mullen that her neck and upper right extremity pain started about a year before, i.e., in calendar year 2008. In her history, Donna talked about the 2006 accident. However, she only related low back pain and right lower extremity symptoms to it.

Considering everything, a jury could, and did, question Donna's credibility about the extent of her injuries. A jury could, and did, reject parts of the medical evidence about a cervical neck strain and permanency of injuries. A jury could measure the extent of a temporary injury. As Defendant argues, a jury could find that Sabbagh was in a better position to assess Donna's condition. He saw her shortly before trial, but Freedman had not seen her recently. Donna's lifestyle witnesses had not lived with her for awhile. Stale information about her condition on a before and after basis could be discounted.

However, the jury was not free to ignore the admitted medical injuries found by Dr. Sabbagh which he attributed to the crash.[3] The unrefuted damages include a temporary lumbar strain. They are supported by objective findings of spasms consistent

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[3] *Id.*

with soft tissue injury to her muscles and ligaments. They also include injuries to her hip, leg, and a split lip when she struck her head against the steering wheel. These injuries are worthy of at least minimal damages, and there was no reasonable basis to reject them. There should have been an award beyond zero.

In this posture, a zero verdict is against the great weight of the evidence. By failing to provide compensation and by failing to give a total damages result from which the prior settlement would be subtracted, the jury disregarded conceded evidence and the rules of law.[4] A jury would be free to return a low verdict, but it was not entitled to find nothing which is shocking to the conscience of the Court.

The defense asks that additur be considered. I am not keen on a new trial because if a second jury finds a low range of damages, the end result is no recovery (e.g., assuming $5,000 verdict for total compensation; assuming the tortfeasor had minimum liability limits of $15,000, subtracting $5,000 would yield a negative $10,000). Although the Court could grant an additur, this discretion will not be exercised given deference to the jury system.

The jury arbitrarily disregarded admitted medical evidence and did not return any amount as should have been the case. Because Anthony's loss of consortium claim is inextricably intertwined with Donna's injuries, his claim will have to be considered again, also.

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[4] *Id.* at *1.

Considering the foregoing, a new trial on damages only is ordered, and the jury verdict is vacated.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary