SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Kenneth M. Roseman, Esquire
Kenneth Roseman, P.A.
1300 North King Street
P.O. Box 1126
Wilmington, Delaware 19899
Attorney for Plaintiff Troy Hagendorn

Colin M. Shalk, Esquire
Casarino, Christman, Shalk, Ransom & Doss, P.A.
405 North King Street
Suite 300
P.O. Box 1276
Wilmington, Delaware 19899
Attorney for Defendant State Farm Mutual Insurance Company

Re: Troy Hagedorn v. State Farm Mutual Insurance Company
C.A. No. 09C-09-211 RRC

Submitted: April 12, 2011
Decided: June 10, 2011

On Plaintiff Troy Hagedorn's Motion for a New Trial.
GRANTED.

On Defendant State Farm Mutual Insurance Company's Motion for Costs.
DENIED AS MOOT.

Dear Counsel:

INTRODUCTION

Plaintiff Troy Hagedorn ("Plaintiff") has moved for a new trial based on a jury verdict awarding $0 in damages. This award was contrary to the

Court's specific instructions to the jury that Plaintiff must be awarded some amount of money for damages he sustained in the instant motor vehicle accident because there was no dispute that he had incurred some injury caused by this accident.

Upon review of the facts, the law, and the parties' submissions, Plaintiff's motion for a new trial is **GRANTED**. It necessarily follows that Defendant's motion for costs based on the jury's verdict is **DENIED AS MOOT.**

FACTS AND PROCEDURAL HISTORY

The underlying facts of this case are not in material dispute. Plaintiff was involved in a motor vehicle accident on January 21, 2004.[1] It is undisputed that uninsured motorist was at fault for this accident;[2] Plaintiff accordingly brought an uninsured motorist claim against Defendant, his uninsured motorist insurance carrier.[3]

Trial in this case began on December 13, 2010. Plaintiff and his longtime live-in paramour, Wanda Kirby, testified. Their testimony contained many inconsistencies that raised significant credibility issues. For example, Plaintiff testified that his injuries were so debilitating as to have resulted in his total disability from gainful employment; to support this contention, Plaintiff alleged that he was unable to resume working as a delivery driver for the News Journal newspaper.[4] However, in contrast to his assertion, it was undisputed that Plaintiff's employment relationship with the News Journal had in fact continued over the following six years, as the newspapers were delivered in accordance with his responsibilities; Plaintiff contended that this discrepancy was explainable due to the fact that Wanda Kirby delivered the newspapers during this six year period.[5] Despite Plaintiff's testimony that his employment responsibilities required at least 40 hours, and sometimes as many as 70 hours, of work per week, Wanda Kirby nonetheless maintained that she completely covered Plaintiff's work responsibilities in addition to her

---

[1] Pltf.'s Mot. for a New Trial at 1.
[2] Pretrial Stipulation at 2 (Lexis Transaction No. 34531217).
[3] *See* Complaint ¶¶ 3-4.
[4] Trial Transcript of Dec. 13, 2010 at 8.
[5] *Id.* at 20. Indeed, Plaintiff Troy Hagedorn executed a new agreement with the News Journal in March 2009. *Id.* at 128.

own full-time employment schedule.[6] Under cross-examination, Plaintiff Troy Hagedorn had testified at his deposition as follows:

> Q. [Subsequent to the instant accident] [y]ou were sleeping til noon watching TV when you got up?
> A. Pretty much, yes.
> Q. Did you do things around the house?
> A. Very little.
> Q. A little cleaning, a little cooking?
> A. Very little.
> Q. Who was doing the cleaning and the cooking?
> A. Wanda Kirby. . . .she was also cutting the grass.
> Q. All right. . . .So Wanda was working three jobs, doing the cleaning, doing the cooking, cutting the grass, and you were watching TV?
> A. Yes.
>
> * * *
>
> Q. At [the time Plaintiff Troy Hagedorn renewed his contract with the News Journal in 2009], Wanda had been delivering papers for over five years?
> A. Yes.
> Q. She was able to keep up working, that was 80 hours a week?
> A. Yes.
> Q. And do the cleaning, cutting the grass, all that stuff, too?
> A. Yes, sir.[7]

Plaintiff's contentions that Wanda Kirby regularly completed his delivery route was further undermined by the fact that Plaintiff was involved in a subsequent motor vehicle accident at 4:54 a.m. on January 21, 2008, a time of day that he conceded was consistent with the time would have

[6] *Id.* at 99.

[7] *Id.* at 123-24, 129. Plaintiff also testified that his brother may have delivered the papers on his route for some period of time. *Id.* at 101 (Q. "[W]ho was delivering the papers?" A. "Either Wanda Kirby or my brother."). Further, Wandy Kirby testified that, despite the fact that she was fulfilling all of Plaintiff's delivery route responsibilities in addition to her own work schedule and virtually all of the necessary housework for a six year period, she never requested or even suggested that Plaintiff see a different doctor, notwithstanding his apparent lack of improvement. *Id.* at 176 ("He's satisfied with a doctor who, from your point of view, is left him to the point that he can't wash dishes, at least only occasionally; he could vacuum one room at a time. He testified that he sleeps until noon. He watches TV. You do all the work. You do inside and outside deliveries, too. Is that what you mean by satisfied?" A. "If he's satisfied with the doctor, I have no right to tell him what doctor to see.").

completed his delivery route.[8] Although Plaintiff asserted that he was en route home after babysitting for his sister at the time of this accident, the emergency room report revealed that Plaintiff reported being employed by the News Journal and provided a health insurance policy number that was issued to him through the News Journal.[9]

Similarly, both Plaintiff and Wanda Kirby were cross-examined at length about their failure to have filed tax returns since 2003. Plaintiff testified that he failed to file his 2003 tax return because the News Journal sent him the "wrong" forms, and that he was unable to file a return in every subsequent year due to his failure to cure the 2003 delinquency.[10] Wanda Kirby simply stated that her failure to file tax returns since 2003 was due to "stupidity;" she testified that her cessation of filing tax returns the same year as Plaintiff was "not a coincidence" but was instead "just life."[11]

The jury was instructed that it must award Plaintiff some amount of money to compensate him for his injuries. In relevant part, the jury instructions provided as follows:

> You are instructed to award some amount of money to the plaintiff, Troy Hagedorn, for the damages that he sustained in the motor vehicle collision of January 21, 2004. The amount of damages that you award is entirely up to you. Your award of damages should be based solely upon the evidence presented and the law that I have just read to you.[12]

Significantly, Defendant did not dispute that the jury should be instructed to award Plaintiff some amount of damages. Indeed, in relevant part, Defendant's own proposed jury instruction on this issue read as follows:

> There is evidence and testimony that Plaintiff suffered some injuries in the accident in the form of strains of the spine. You are

[8] *Id.* at 125-26 ("You told [your counsel] that you were delivering papers from 1:30 a.m. until about 5 or 6 a.m.; is that correct?" A. "Yes." Q. "So you're telling the jury now that while it may have been during that time, it's not that particular route; is that correct?" A. "Yes.").
[9] *Id.* at 127.
[10] *Id.* at 103-09.
[11] *Id.* at 164-65.
[12] Jury Instructions at 8 (Lexis Transaction I.D. 34882616).

instructed to award some amount of money for his injuries from the accident of January 21, 2004.[13]

Notwithstanding the Court's foregoing instructions, the jury returned a verdict awarding $0 for Plaintiff's injuries.[14] Although Defendant requested that the jury be specifically instructed to award Plaintiff some measure of damages and required to complete further deliberations on this point, the Court determined that further deliberations by this jury would be inappropriate because the jury chose to disregard the Court's unambiguous instruction.[15]

CONTENTIONS OF THE PARTIES

Plaintiff moves for a new trial, pursuant to Superior Court Civil Rule 59(a), on the ground that jury's award of $0, notwithstanding Defendant's admission that Plaintiff sustained an injury, was contrary to the evidence and inappropriate.[16] To the extent Defendant seeks to retract its earlier admission that Plaintiff sustained some injury, Plaintiff asserts that Defendant remains bound by this judicial admission.[17] Though Plaintiff concedes that the Court may order *additur*, Plaintiff contends that *additur* would be inappropriate in this case because "Plaintiff has not yet received a trial decided by a jury that has fairly applied the law as instructed by the Court."[18]

Defendant responds that the jury should not have been instructed that it must award Plaintiff some measure of damages, even though Defendant had consented to that instruction at trial.[19] Defendant asserts that "upon reconsideration the Court should not have instructed the jury to award money to the Plaintiff" because "[t]here was no substantial evidence of injury."[20] According to Defendant, the Plaintiff and Wanda Kirby's credibility issues, together with the disparity between Plaintiff's objective symptoms and his

---

[13] Def.'s Proposed Jury Instruction (Lexis Transaction I.D. 34882616).
[14] Verdict Sheet (Lexis Transaction I.D. 34882616).
[15] *Id.* at 72-73 ("I've concluded that, even though defendant would like the jury to deliberate further, that's not appropriate. I don't see how they could have misunderstood that they were required to come back with a dollar figure and they chose not to.").
[16] Pltf.'s Mot. For New Trial at 3.
[17] Pltf.'s Reply Br. at 1.
[18] *Id.* at 1-2.
[19] Def.'s Answ. Br. at 17.
[20] *Id.*

subjective complaints, rendered it "within the purview of the jury to reject the claims of injury and disability for which monetary compensation should be awarded."[21]

STANDARD OF REVIEW

A party's motion for a new trial is controlled by Superior Court Civil Rule 59, which provides, in relevant part, as follows:

> A new trial may be granted as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court.[22]

When reviewing a motion for a new trial, the Court's baseline presumption is that the jury's verdict was correct.[23] Accordingly, "[b]arring exceptional circumstances, the trial judge should 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, or for some reason, justice would miscarry if the verdict were allowed to stand."[24]

However, when there is uncontradicted medical testimony that a plaintiff has suffered an injury as a result of the accident at issue, an award of $0 is "inadequate and unacceptable as a matter of law."[25] Likewise, "[w]hile a jury has great latitude, 'it cannot totally ignore facts that are uncontroverted and against which no inference lies.'"[26] In short, "once the existence of an injury

---

[21] *Id.*

[22] Super. Ct. Civ. R. 59(a).

[23] *See, e.g.*, *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979) ("When the motion for a new trial solely on weight of the evidence grounds is denied in a jury case, this Court on appeal is bound by the jury verdict if it is supported by evidence.") (citations omitted); *Smith v. Lawson*, 2006 WL 258310 (Del. Super. Ct. 2006) ("Every analysis of a motion for a new trial must begin with the presumption that the jury verdict is correct.").

[24] *Burgos v. Hickok*, 695 A.2d 1141, 1145 (Del. 1997) (citation omitted).

[25] *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).

[26] *Id.* (quoting *Haas v. Pendleton*, 272 A.2d 109, 110 (Del. Super Ct. 1970)); *see also* *Amalfitano v. Baker*, 794 A.2d 575, 578 (Del. 2001) ("Evidence [of a plaintiff's injury] that is unrebutted when presented by one side but left uncontradicted by the other party should also, absent unusual circumstances, be considered 'conclusive.").

has been established as causally related to the accident, a jury is required to return a verdict of at least minimal damages."[27]

DISCUSSION

Based on the foregoing, this case fits squarely within *Maier*, *supra*, and its progeny.[28] That is, it was not disputed that Plaintiff sustained some degree of injury due to the instant accident. Defendant's pretrial and trial concessions that Plaintiff suffered at least some degree of injury is conclusive on this point; in the Pretrial Stipulation, Defendant's position was that Plaintiff's injuries are "not as serious as claimed," thereby implicitly acknowledging that Plaintiff suffered some injury.[29] Defendant accordingly submitted proposed jury instructions that reflected Plaintiff's entitlement to "some amount of money for his injuries" sustained in the instant accident.[30]

---

[27] *Maier*, 697 A.2d at 749; *see also Hedenberg v. Best*, 2005 WL 1953038, *3 (Del. Super. Ct. 2005) ("[T]here is no reasonable basis to support the jury verdict of no damages for the cervical neck strain suffered by Plaintiff. While Plaintiff appears to have overstated her injuries, the proverbial gilding of the lily cannot put her completely out of court where there is objective evidence of some injury related to the accident. Under the law she is entitled to minimal damages."). *But cf. Gier v. Kananen*, 628 A.2d 83, *2 (Del. 1993) (affirming the denial of the plaintiff's motion for a new trial following a verdict awarding no damages, observing that"[w]hen experts, in the process of formulating an opinion, rely upon the subjective representations of the plaintiff, determination of the credibility of the plaintiff's representations is solely within the province of the jury and the jury may accept or reject these representations as it sees fit."); *Amalfitano*, 794 A.2d at 575 ("It 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. In *Gier*, we affirmed the decision of the Superior Court denying a new trial where the jury awarded zero damages when the plaintiff had presented uncontradicted expert medical opinion based solely upon the subjective complaints of the plaintiff to establish proximate cause. That case differs significantly from the case before us.") (citation omitted); *Brown v. Hudson*, 2008 WL 4152741, *1 (Del. Super. Ct. 2008) ("Unlike in *Amalfitano,* there were no objective findings of injury. Rather, the three medical experts based their opinions largely on the plaintiff's subjective complaints, and the evidence presented at trial called into question the plaintiff's credibility, including his failure to reveal prior injuries. Thus, the jury was entitled to reject the plaintiff's subjective complaints as not credible and free to reject the opinions of the experts, which were based on the subjective complaints of the plaintiff.").

[28] It appears that the jury simply did not want to award Plaintiff *any* damages in light of Plaintiff's significant credibility issues. However, *Maier*'s strict language, as restated in this opinion, precludes that option for the jury in this case.

[29] Pretrial Stipulation at 6 (Lexis Transaction I.D. 34521317).

[30] *See supra* note 13.

Therefore, Plaintiff is entitled to a new trial, because, pursuant to *Maier*, the jury was required (and instructed) to "return a verdict of at least minimal damages,"[31] and it failed to do so.

Though Defendant's Answering Brief indicates that it has now reconsidered its trial position on this issue,[32] Defendant is judicially estopped from retracting its earlier concession that Plaintiff sustained an injury in the 2004 accident.[33] Generally, judicial estoppel "operates only where the litigant's contradicts another position that the litigant previously took *and* that the Court was successfully induced to adopt in a judicial ruling."[34] In this case, the Court utilized jury instructions that reflected the parties' shared view that Plaintiff sustained some injury in the 2004 accident and was accordingly entitled to some amount of money damages.

Finally, the Court declines to award *additur* in this case. Although Delaware has a "long history"[35] of using *additur* and *remitter* to increase or decrease jury verdicts, respectively, the unliquidated nature of Plaintiff's physical injury militates in favor of allowing a jury to determine the appropriate award. It is true that this Court, "in cases involving unliquidated damages, has granted additur several times,"[36]and the Supreme Court of Delaware has repeatedly approved the use of *additur* in personal injury claims.[37] Nevertheless, in this case, the jury failed to provide a sufficient basis on which to determine the appropriate amount of *additur*; the Supreme Court has observed that *additur* does not violate a party's right to a jury trial because "the court still defers to the jury and reduces the jury's award to the absolute maximum amount that the record can support (in the case of *remittitur*) and increases the award to the absolute minimum amount that the record requires (in the case of *additur*)."[38] In this case, it would be inappropriate for the Court to defer to the jury's verdict in determining *additiur*, because, in reaching its

---

[31] *Maier*, 697 A.2d at 749.
[32] *See supra* note 20.
[33] *See, e.g., Motorola, Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859 ("Judicial estoppel acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier legal proceeding.").
[34] *Id.* at 859-60 (quoting *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, *3 (Del. Ch. Ct. 1998)).
[35] *Reid v. Hindt*, 976 A.2d 125, 129 (Del. 2009) (citations omitted).
[36] *Carney v. Preston*, 683 A.2d 47, 50 (Del. Super. Ct. 1997) (citations omitted).
[37] *Reid*, 976 A.2d at 130 (citation omitted).
[38] *Id.* at 131 (quoting *Murphy v. Thomas*, 801 A.2d 11, *1 (Del. 2002).

verdict, the jury disregarded a valid and unambiguous instruction.[39] Thus, the Court declines to order *additur* in this case.[40]

CONCLUSION

For all the reasons stated above, Plaintiff's motion for a new trial is **GRANTED**. It necessarily follows that Defendant's motion for costs is **DENIED AS MOOT.**

IT IS SO ORDERED.

____
Richard R. Cooch, R.J.

oc: Prothonotary

[39] *See supra* note 15.

[40] Defendant also filed a motion for costs, pursuant to Superior Court Civil Rule 68, based upon Defendant's August 20, 2010 offer of judgment in the amount of $20,000. Def.'s Mot. for Costs at 1. However, given an award of costs under Rule 68 is predicated on the judgment "finally obtained by the offeree" being less favorable than the offer. Given the Court's decision that Plaintiff is entitled to a new trial, it necessarily follows that the judgment finally obtained by Plaintiff is yet to be determined. Thus, Defendant's motion for costs is effectively mooted by the granting of Plaintiff's motion for a new trial.