Submitted: September 24, 2001
Decided: December 20, 2001

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James A. Folk, Jr., and Sondra L. Folk, v. Keith Hobbs and Del Tech Engineering, Inc., C.A. No.: 99C-02-197-FSS
Upon Defendants Motion for New Trial or Remittitur -- ***DENIED***
and Plaintiffs' Motion for Costs -- ***GRANTED****, in part,* ***DENIED****, in part.*

Dear Counsel:

This is the decision on Defendants' Motion for New Trial or Remittitur and Plaintiffs' cross Motion for Costs. Defendants' motion is based on their claim that the jury's verdict, $144, 000 for James Folk and $56,000 for his wife's loss of consortium, was shockingly excessive. In this letter/order, the court will present the facts and the standard of review. Then the court will discuss the verdict. Finally, the court will consider Plaintiffs' Motion for Costs.

I.

As we know, James A. Folk, Jr., was a teamster. While he was watching one of Del Tech Engineering's employees, Keith Hobbs, unloading heavy compressors from Folk's tractor-trailer, Hobbs lost control of a pallet carrying one of the compressors. While Hobbs was trying to regain control of the pallet, it slid into Folk's foot. At trial, Defendants questioned why Folk did not move out of the way of the heavily ladened, sliding pallet. Apparently, the jury appreciated Defendants' point, at least to the extent that it found Folk 30% contributorily liable for his own injury. But the jury found Defendants primarily liable and, obviously, the jury viewed Plaintiffs' damages as quite substantial.

In their opening and reply briefs, which are excellent, Defendants insist that Folk's foot injury was "relatively minor." They emphasize the facts that: Folk was not taken to the hospital after the accident, Folk "only" saw one physician, the physician "never operated," no pins were put in Folk's foot, Folk continued to drive throughout the region until his trucking terminal closed-up shop, and Folk continues to engage in normal activities like cutting the grass. While Defendants insist that they "do not 'gloss over' evidence submitted by Plaintiffs," they do not present all the evidence about Folk's injuries. And while Defendants attempt to present the evidence in a balanced way, at this point the court must view all the evidence in the light most favorable to Plaintiffs. Defendants do not present Plaintiffs' evidence in that light.

Although, as Defendants argue, Folk was not taken to a hospital immediately after the accident, he did receive medical attention almost immediately. More importantly, Plaintiff's expert witness, a podiatrist, testified that x-rays revealed that Folk sustained "a crush injury" involving commuted fractures to several bones of his foot. The doctor explained that a commuted fracture "means it's fragmented." "[T]here has been a kind of explosion-type injury, in other words, the bone is crushed and fragments actually will flake off of areas of bone." The expert also explained that Folk's injury involved not only his foot bones, but also the surrounding tissue and

skin. The medical expert further testified that Folk "developed arthritic changes throughout the mid-foot joints . . . and, subsequently, he had some significant problems as he went down the road." Furthermore, the doctor testified that Folk has a circulatory problem involving consistent and continued swelling in Folk's right foot, which the doctor attributes "to damage of some of the venous vessels that go back to the heart . . . ." Folk's doctor conceded that Folk suffers from non-accident related, generalized edema. Nevertheless, the doctor associated consistent swelling in Folk's right foot with the accident. In summary, the medical expert opined that in addition to the pain and problems immediately caused by the accident, Folk will have permanent difficulties, including pain and swelling, stemming from traumatic arthritis caused by the accident.

Defendants not only understate Folk's injuries and their permanency, they understate Folk's pain. For example, Defendants argue that "Folk described his foot pain as 'feeling like a tooth ache'." Actually, Folk testified "[A]nd it was feeling like a tooth ache all the time, especially when it was cold." By further example, while Defendants emphasize the ways that the quality of Folk's life has not been reduced by the accident, they understate or ignore the ways that the accident has left Folk a changed man. Plaintiffs testified about several ways that Folk's injuries have reduced his mobility and limited his daily and recreational activities. In summary, Plaintiffs' testimony, considered in conjunction with Folk's medical expert testimony, supports the conclusion that when Defendants crushed Folk's foot it caused considerable pain, it permanently impaired Folk's foot and it permanently reduced the quality of his life. In reviewing the evidence here, the court has relied on examples. A more complete review of the record further justifies the verdict's amount.

The court views the evidence concerning Sondra Folk's loss of consortium in a similar way. The fact that Folk was not the man he was before the accident means that he also is not as much of a husband. Thanks to the accident, Sondra Folk has to shoulder more household responsibilities and contend with a

somewhat disabled husband.

II.

On a motion for new trial, the court must determine whether the "verdict is against the great weight of the evidence."[1] Only when a jury's verdict is "clearly the result of passion, prejudice or partiality, or it was manifestly in disregard of the evidence or rules of law," is a new trial justified.[2] The court must uphold a jury verdict that is supported by the evidence.[3]

The standard for reviewing damage awards is clear:

> The degree of pain differs in individuals and may be constant or varying from day to day. Ultimately, the award of damages for pain and suffering is a matter for the judgment of the jury, and only when its judgment is

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1 *Storey v. Camper*, Del. Supr., 401 A.2d 458, 465 (1979).

2 *Storey v. Castner*, Del. Supr., 314 A.2d 187, 193 (1973).

3 *Medical Ctr. of Delaware v. Lougheed*, Del. Supr., 661 A.2d 1055, 1061 (1995).

shocking will it be disturbed.[4]

[4] *Aleardi v. Tiberi*, Del. Supr., 269 A.2d 404, 405 (1970).

When an injury's circumstances warrant, very substantial awards have been upheld.[5] Remittitur is granted only when the award is "so out of proportion to the injuries as to shock the Court's conscience and sense of justice."[6] Historically, Delaware courts give great deference to jury verdicts.[7]

III.

Both sides attempt to compare this case with others in order to establish that the verdict was either shockingly high or totally appropriate. As an example, the case that the court finds most helpful is *Davis v. Galloway*,[8] attached. In 1993 a jury awarded Davis $185,000 for injuries to her knees caused by an automobile accident.

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[5] *Delaware Electric Co-op., Inc. v. Duphily*, Del. Supr., 703 A.2d 1202, 1210-1211 (1997).

[6] *Riegel v. Aastad*, Del. Supr., 272 A.2d 715, 717-718 (1970).

[7] *Young v. Frase*, Del. Supr., 702 A.2d 1234, 1236 (1997).

[8] *Davis v. Galloway*, Del. Super., C.A. No. 92C-04-235, Silverman, J. (Feb. 14, 1994) (ORDER).

The court views Davis' injuries as relatively more serious than Folk's: when Davis' pre-arthritic condition ripens into arthritis, she is likely to need two, knee replacements. She also has a longer life expectancy. Nevertheless, she received a larger verdict, over eight years ago. Even if the verdict in this case is relatively higher than the verdict in *Davis v. Galloway*, which is questionable, the difference is not so great that the court can call it "shocking."

Folk's verdict was high in absolute and relative terms. Nonetheless, considering that the verdict encompassed the pain associated with a crushed foot and permanent impairment due to traumatic arthritis, $144,000 does not seem excessive. Similarly, $56,000 for loss of consortium in this case seems generous, but not impassioned.

The court has not ignored Defendants' reliance on *Middleton v. Wilmington Housing Authority.*[9] In *Middleton*, the court granted remittitur. That verdict not only involved a very elderly, and sympathetic plaintiff with a well healed, broken ankle. It also involved an overt effort by plaintiff's counsel to play on the jury's sympathy. The court's reliance on the jury as the proper arbiter for pain and suffering was undermined by the way the case was presented. In this instance, the

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[9] *Middleton v. Wilmington Housing Authority*, Del. Super., C.A. No. 91C-09-261, Silverman, J. (Feb. 28, 1995) (ORDER).

court cannot view the verdict as being influenced by any improper motive on the jury's part. By the same token, as to the loss of consortium verdict, Defendants read too much into *Montague v. Bellevue Park Corporate Center "D" Limited Partnership*[10] where the court suggested that "10-15% of [a tort claim] settlement is a reasonable allocation for loss of consortium." *Montague*, however, concerned the court's passing on whether a settlement that attributed 50% to loss of consortium was reasonable. *Montague* did not involve whether a jury verdict like the one here is shocking. Moreover, other recent verdicts on loss of consortium have easily exceeded 10-15%. In closing, the court agrees with Defendants that this verdict was high. It was more than I would have awarded, but it was not so out of line that it should not stand.

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[10] *Montague v. Bellevue Park Corporate Center "D" Limited Partnership*, Del. Super., C.A. No. 98C-06-144, Silverman, J. (Oct. 13, 2000) (Prelim. Order).

IV.
Plaintiffs' Motion for Costs

As prevailing parties, Plaintiffs have applied for costs, including expert witness fees, under Superior Court Civil Rule 54 (d)-(h) and 10 *Del. C.* § 8906. Plaintiffs' application is in the form of an itemized bill of costs. For Drs. Kupcha's and Minnehan's expert witness fees, Defendants do not oppose Plaintiffs' motion for costs. Defendants do, however, dispute Plaintiffs' request for an expedited transcript of Dr. Kupcha's testimony. Further, Defendants object to Plaintiffs' request for the cost of expediting Keith Hobbs' testimony and to Plaintiffs' request for the cost of Dr. DiPretoro's trial testimony.

Upon submission, I will sign an order allowing the undisputed costs, the costs of an unexpedited transcript of Dr. Kupcha's testimony and three hours of Dr. DiPretoro's time, at his standard rate. The court does not question the other costs, except that it finds them unnecessary.

V.

For the foregoing reasons, Defendants' Motion for New Trial or Remittitur is **DENIED** and Plaintiff's Motion for Costs is **GRANTED**, in part and **DENIED**, in part.

IT IS SO ORDERED.

Very truly yours,

FSS/lah
attachment
oc: Prothonotary (Civil Division)
Patricia Battersby, Case Manager