IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ANDREW P. RASH and APRIL RASH,	)	
Plaintiffs,	)	
v.	)	C.A. No. N13C-06-068 VLM
JUSTIN C. MOCZULSKI and DIAMOND MATERIALS, LLC,	)	
Defendants.	)	

Date Submitted: January 5, 2016
Date Decided: April 25, 2016

OPINION

Upon Consideration of Plaintiffs' Motion for a New Trial.
DENIED.
Additur GRANTED.

Lawrance Spiller Kimmel, Esquire, KIMMEL, CARTER, ROMAN, PELTZ & O'NEILL, P.A., Newark, Delaware. Attorney for Plaintiffs.

Richard D. Abrams, Esquire, MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS, LLP, Wilmington, Delaware. Attorney for Defendants.

BUTLER, J.

INTRODUCTION

Before the Court is a Motion for a New Trial, in which Andrew Rash and April Rash seek relief from a jury's verdict in a personal injury action arising from an auto accident. Defendant Justin C. Moczulski conceded the accident was his fault prior to trial. The jury found that Moczulski's negligence proximately caused one or more injuries to Mr. Rash ("Plaintiff"), but awarded no damages. Plaintiff seeks a new trial pursuant to Superior Court Civil Rule 59[1] arguing that the jury's verdict "shocks the conscious."

FACTS

On September 22, 2011, Moczulski's pickup truck rear-ended Plaintiff's car. Plaintiff claims that he sustained internal head injuries, a broken tooth, and temporomandibular joint disorder ("TMJ") as a result of the collision. Defendants argued that Rash's alleged injuries were not proximately caused by the accident, but rather were the result of Rash's non-compliance with his doctors' recommendations.

Trial in this case began on September 14, 2015. Over the course of the two-day trial, the jury heard testimony from four experts. Plaintiffs' first expert, Dr. Townsend, testified that Rash suffered jaw pain, tinnitus (ringing in the ear),

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[1] Superior Court Civil Rule 59 provides:

> A new trial may be granted as to all or any of the parties 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.

memory loss, headaches, mental fogginess, and a concussion as a result of the accident. Dr. Townsend ultimately diagnosed Plaintiff with a mild traumatic brain injury, also known as post-concussion syndrome, which is associated with persistent tinnitus, headaches, and cognitive dysfunction. To this end, Dr. Townsend recommended Plaintiff participate in the Neuromonics program at Jefferson University to treat the tinnitus. Dr. Townsend testified to his belief that Plaintiff would benefit from cognitive behavioral therapy, and referred him to Bryn Mawr Rehabilitation.

Dr. Townsend also referred Plaintiff to Dr. Langan for a neurophsychological evaluation in November 2012. Dr. Langan conducted a series of tests. He testified that the results of the tests were consistent with Plaintiff's subjective complaints, namely difficulty focusing, memory loss, and feelings of anxiety. Dr. Langan testified that Plaintiff's symptoms were indicative of post-concussion syndrome, and attributed that diagnosis to the September 2011 car accident. Dr. Langan recommended Plaintiff see an ear, nose, and throat physician as well as attend psychotherapy sessions to help with his mood related problems. Both Dr. Townsend and Dr. Langan found Plaintiff to be credible.

Two doctors—Dr. Spector and Dr. Wolf—testified on Defendant's behalf. Dr. Spector, a neuropsychologist who conducted an evaluation of Plaintiff. The evaluation revealed a minor neurocognitive disorder, but Dr. Spector cautioned

that he believed Plaintiff was "mildly overstating his functional and cognitive impairment." Nevertheless, Dr. Spector testified Plaintiff sustained at least "an injury" in the accident.

Dr. Wolf also testified on Defendant's behalf. Dr. Wolf opined that Plaintiff's broken tooth was not caused by the accident, but rather was the result of a pre-existing condition. With respect to Plaintiff's TMJ complaints, Dr. Wolf testified that he could neither rule in nor rule out the condition due to lack of sufficient evidence. Dr. Wolf explained that TMJ could be diagnosed by MRI, but since an MRI was not done, he could only assume that Plaintiff suffered from TMJ based on Plaintiff's own complaints.

Plaintiff also testified. He described the injuries that he attributed to the accident—a cracked tooth, TMJ, tinnitus, and headaches—as well as the medical treatment he has received for the injuries. Plaintiff was evaluated for the Neuromonics program, and testified he experienced improvement with his tinnitus right away. Plaintiff chose not to participate in the program, however, because it would interfere with his work schedule and take too much time in light of his wife's medical needs at the time. He also testified he only completed an evaluation with Bryn Mawr Rehabilitation, but did not return for treatment. Plaintiff sought treatment at the Penn Concussion Clinic, where he began receiving Botox shots to treat his headaches. Plaintiff found the Botox treatment to be effective.

On cross-examination, Plaintiff admitted that he only attended one cognitive behavioral therapy appointment despite several doctors' opinions that psychological treatment would help the tinnitus. Plaintiff also acknowledged that he would not be eligible for the Neuromonics program unless and until he received cognitive therapy. Plaintiff explained that he could not make the time commitment needed for therapy sessions.

At the close of evidence, the Court instructed the jury with respect to damages, among other relevant areas of law. Specifically, the Court instructed the jury:

> An injured party must exercise reasonable care to reduce the damages from the resulting injuries. If you find that Mr. Rash failed to undergo reasonable medical treatment to reduce his damages, or that he failed to follow reasonable medical advice, then any damages resulting from that failure are not the responsibility of [Defendants] and should not be included in your award.[2]

The Jury returned its verdict, finding that the accident proximately caused injury to Plaintiff, but awarded no damages.

STANDARD OF REVIEW

"Traditionally, the [C]ourt's power to grant a new trial has been exercised cautiously and with extreme deference to the findings of the jury."[3] Barring exceptional circumstances, the amount of damages awarded by a jury is presumed

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[2] The Court modeled its instruction according to Delaware Pattern Jury Instructions § 22.4. Plaintiff did not object to this instruction.

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

to be correct.[4] A verdict should only be set aside when the verdict is so heavily against the weight of the evidence that a reasonable juror could not have reached the result,[5] or for some reason, "justice would miscarry if the verdict were allowed to stand."[6] Accordingly, wherever "there is any margin for a reasonable difference of opinion in the matter, the Court should yield to the verdict of the jury."[7] "[A]s long as there is a sufficient evidentiary basis for the amount of the award, the jury's verdict should not be disturbed by a grant of additur or new trial as to damages."[8]

DISCUSSION

It is well settled Delaware law that a jury "cannot totally ignore facts that are uncontroverted and against which no inference lies."[9] Indeed, "where the evidence presented at trial conclusively establishes the existence of an injury, however minimal, a jury award of zero damages is against the weight of the evidence and it is an abuse of discretion to deny a new trial."[10]

In *Cooke v. Murphy* the Superior Court denied a motion for new trial filed in response to a jury's verdict finding that the plaintiff sustained injuries as the result

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[4] *Cooke v. Murphy*, 2014 WL 3764177, at *2 (Del. July 30, 2014).
[5] *Id.*
[6] *Hagedorn v. State Farm Mut. Ins. Co.*, 2011 WL 2416737, at *3 (Del. Super. June 10, 2011) (quoting *Burgos v. Hickock*, 695 A.2d 1141, 1145 (Del. 1997)).
[7] *Id.* (quoting *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979)).
[8] *Jones v. Shisler*, 2002 WL 1038822, at *5 (Del. Super. May 16, 2002).
[9] *Cooke*, 2014 WL 3764177, at *2.
[10] *Id.* (quoting *Maier*, 697 A.2d at 748).

of a car accident but awarding no damages. At trial, the jury heard testimony from one expert witness who testified on the plaintiff's behalf. The expert's opinions were based entirely on the plaintiff's subjective complaints; there was no objective verification. On appeal, the Supreme Court explained that where the evidence at trial conclusively establishes the existence of an injury, a jury award of zero damages warrants a new trial. The Court affirmed the Superior Court's denial, however, on the basis of a narrow exception: "where the facts supporting an injury are controverted or where medical testimony of the injury is based on the plaintiff's subjective complaints, which are not confirmed by independent objective testing, a motion for a new trial on the basis of a zero damages verdict will be denied."[11]

The Court appreciates Defendants' position that one possible interpretation of the verdict is that the jury could have determined even if Plaintiff sustained injuries as a result of the accident, any continuing injury was the result of Plaintiff's failure to follow his doctors' medical advice and recommendations, thus reducing his damages to zero. But whatever the jury's rationale, a zero dollar verdict is necessarily "against the great weight of the evidence" where medical experts agree that the accident proximately caused at least some injury.[12]

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[11] *Cooke*, 2014 WL 3764177, at *2.
[12] *Storey*, 401 A.2d at 465; *Maier*, 697 A.2d at 749.

As the Court sees it, the issue here is not whether Plaintiff was injured as a result of the accident—both parties' experts testified that there was at least some evidence that he was, and the jury found the accident was a proximate cause of Plaintiff's injuries based on the uncontroverted testimony. Therefore, Plaintiff is entitled to additur and/or a new trial. But, when considering the appropriate remedy, the particular circumstances here give the Court pause. Not only was the exact nature and extent of Plaintiff's injury "in play" as between the experts on both sides, but Plaintiff's failure to mitigate his injuries through treatment made identifying and compensating the injury quite problematic.

The jury heard testimony about the various medical treatments recommended for Plaintiff. Defense counsel noted that Plaintiff's doctors repeatedly recommended psychotherapy to help not only his emotional concerns, but also his tinnitus. Plaintiff simply did not have the time. Dr. Townsend highly recommended the Neuromonics Program. Again, Plaintiff could not commit the time for the program.

The Court cannot square the evidence of Plaintiff's failure to mitigate his damages with a claim that he is entitled to a new trial on damages, specifically damages that the jury concluded Plaintiff failed to mitigate or otherwise prove up when he was given every opportunity to do so at trial. No evidence was suppressed, no objections were sustained, and no rulings were issued that

prevented Plaintiff from stating his case as forcefully and completely as he could. A jury trial is not a dress rehearsal. There was a time and place for Plaintiff to prove his case and the jury essentially rejected the proposition that Plaintiff proved he was entitled to an award of damages.

Plaintiff's request that the Court void the jury's verdict in favor of a new trial, to essentially give him a "mulligan" on his failed evidence of damages, is inconsistent with our fundamental notion that juries are the sole judges of the facts. Here, the jury found that Plaintiff had failed to prove up whatever damages he may have suffered aside from those he failed to mitigate. The Court will not reward Plaintiff's failure of proof with a "re-do."

Nevertheless, the Court is satisfied that Plaintiff conclusively proved *some* degree of compensable injury. As the Court previously observed, both parties' experts agreed that the accident proximately caused some injury. Moreover, there was no reasonable basis for the jury to believe that Plaintiff's injury was fabricated—the experts expressly testified they found Plaintiff's subjective complaints to be credible.

Having concluded that Plaintiff is legally entitled to some relief, the Court finds Plaintiff is entitled to additur. In doing so, the Court will grant every

reasonable factual inference in favor of Defendants and award the lowest amount supported by the evidence.[13]

Dr. Wolf testified that Plaintiff's fractured tooth was not caused by the accident. Therefore, there is evidence from which a reasonable juror could have concluded that Plaintiff's tooth problems were not proximately caused by the accident.

Dr. Wolf also testified that he could not positively confirm a TMJ diagnosis because Plaintiff did not have the necessary MRI performed. The testimony as to TMJ was inconclusive, and therefore the jury was free to reject Plaintiff's claim that he sustained TMJ as a result of the accident.[14]

Finally, the evidence as to Plaintiff's headaches was inconclusive: Plaintiff's medical records show that he suffered headaches prior to the accident and the jury could have reasonably concluded that Plaintiff's headaches pre-dated the accident.

Thus, the only remaining injury for which Plaintiff is entitled to compensation—and it is a stretch—is the tinnitus associated with post-concussive syndrome. These complaints are almost inherently subjective, but no expert

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[13] *Carney v. Preston*, 683 A.2d 47, 56 (Del. 1996) ("[I]n assessing the . . . additur designated amount, tribute is still paid to the very jury whose verdict is being set aside."); *Jones*, 2002 WL 1038822, at *6 ("The premise for additur . . . is that there is a lawful range for every verdict. Additur brings an unjustifiably low verdict up to the bottom of the appropriate range.").

[14] *See Cooke*, 2014 WL 3764177, at *3 (jury free to reject a plaintiff's claim of injury where evidence is based only on subjective complaints and lacks any objective proof of injury).

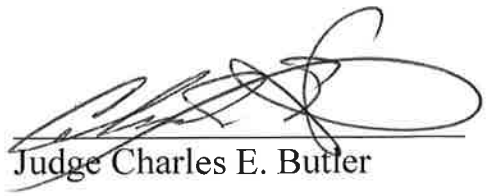
doubted he suffered from tinnitus and there was no evidence his tinnitus pre-dated the accident. Plaintiff testified that he instantly felt relief when he tested the Neuromonics device. While Plaintiff presented no direct evidence of the expenses related to this "device," the Table of Contents to his trial exhibit binder refers to a "Neuromonics Unit" and an expense of $8,000. The exhibit binder was admitted without objection, so the Court must conclude that Defendants effectively waived any objection to the amount stated. Accordingly, the Court will award $8,000 to cover the cost of the "unit" and $2,000 in allowance for additional related office visits, for a total of $10,000.

The Court notes that the jury was instructed that "damages must be proved with reasonable probability and not left to speculation." Plaintiff sought compensation for reasonable and necessary medical expenses incurred to date, but failed to include any documentation upon which the jury could calculate any amount. One can only imagine the jury's frustration in arriving at a damages amount, as the trial exhibits were bereft of evidence of actual expenses incurred.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a New Trial is DENIED in favor of GRANTING the additur detailed in this Opinion.

IT IS SO ORDERED.



Judge Charles E. Butler