IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

AMANDA A. WILLEY,	)	
	)	C.A. No. 00C-02-009 JTV
Plaintiff,	)	
	)	
v.	)	
	)	
JOHN H. McCORMICK,	)	
	)	
Defendant.	)	

Submitted: July 15, 2003
Decided: November 13, 2003

Charles E. Whitehurst, Esq, Whitehurst, Curley & Sunshine, Dover, Delaware. Attorney for Plaintiff.

Jeffrey A. Young, Esq., Young & Young, Dover, Delaware. Attorney for Defendant.

Upon Consideration of Plaintiff's
Motion For A New Trial
GRANTED

VAUGHN, Resident Judge

OPINION

The plaintiff moves for a new trial after a jury returned a verdict for the defendant. For the reasons which follow, a new trial is ordered.

FACTS

On September 11, 1998 the defendant, John H. McCormick, caused a motor vehicle collision between the car which he was driving and another car in which the plaintiff, Amanda A. Willey, was a passenger. She complained of neck pain and was taken by ambulance to a hospital emergency ward.

At the emergency ward Ms. Willey complained of head, neck and upper back pain. The emergency ward record indicates that a physical examination of the plaintiff was performed which showed muscle spasm and decreased range of motion in the neck. The clinical impression was bilateral trapezius muscle strain.

The plaintiff went to see Dr. Stephen M. Beneck, M.D. on September 15, 1998. She continued to complain of neck pain and said that she also began experiencing lower back pain the day after the accident. The doctor performed a physical examination and found that her range of motion of the lower back was more than 75% limited and her range of motion of the neck was more than 50% limited. He prescribed medication, physical therapy and manual treatment by a chiropractor.

At an office visit with Dr. Beneck three months later, on December 18th, the plaintiff reported that she was doing well. Dr. Beneck recorded that her upper back problems had resolved completely. Her lower back bothered her only intermittently, mainly if she sat or drove for a long period of time. Day to day

activities did not bother her. The doctor concluded that she was doing well and needed no additional formal therapy.

Dr. Beneck had no further occasion to see the plaintiff until she went to his office on an emergency basis on July 28, 2000, over a year and a half later. She informed him that on the previous day, while she was at work, and for no apparent reason, she suddenly began to have severe pain in her lower back which radiated into her thighs, legs and feet. An MRI revealed that the plaintiff had a herniated disc in her spine. Much of the time and attention at trial was devoted to the herniated disc and its affect on the plaintiff.

Dr. Beneck expressed the opinion that all of the above-mentioned injuries were caused by the auto accident.

At trial the defendant admitted that his negligence caused the accident. The issues of proximate causation and the nature and extent of the plaintiff's injuries were submitted to the jury.

STANDARD OF REVIEW

When reviewing a motion for new trial, the jury's verdict is entitled to "enormous deference."[1] Traditionally, "the court's power to grant a new trial has been exercised cautiously and with extreme deference to the findings of the jury."[2] In the absence of exceptional circumstances, the validity of damages determined by

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[1] *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997) (*citing* the Delaware Constitution, Art. IV, § 11(1)(a)).

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

the jury should be presumed.[3] This Court will not upset the verdict unless the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result.[4]

DISCUSSION

Maier v. Santucci[5] was a case in which the trial court directed a verdict on liability in favor of the plaintiff and the jury's sole function was to determine the extent of the plaintiff's injuries. The jury returned a zero verdict. In a decision on appeal from the denial of a motion for a new trial, the Supreme Court held 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."[6] In that case the plaintiff was injured when his vehicle was struck in the rear while he was stopped at an intersection. He went to a local hospital and was examined and released without treatment. Approximately 18 days after the accident, he began experiencing significant pain and sought additional medical treatment. This led to treatment extending over three years with little improvement in the plaintiff's condition, according to his treating physician. The nature and extent of the plaintiff's injuries were sharply contested at trial, but the two physicians who

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[3] *Littrel v. Hanby*, 1998 Del. Super. Lexis 10 at *3 - 4, citing *Young*, 702 A.2d at 1236 - 37.

[4] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

[5] *Maier*, 697 A.2d at 748.

[6] *Id*.

testified, one for the plaintiff and one for the defense, agreed that the plaintiff had sustained some injury in the accident. The court noted that "once the existence of an injury has been established as causally related to the accident, a jury is required to return a verdict of at least minimal damages."[7]

Amalfitano v. Baker[8] was a case in which the defendant admitted liability and the case was submitted to the jury on damages alone. The jury returned a zero verdict. The Supreme Court concluded that "where medical experts present uncontradicted evidence of injury, confirmed by objective medical tests supporting a plaintiff's subjective testimony about her injuries and offer opinions that the injuries relate to the accident about which the plaintiff complains, a jury award of zero damages is against the weight of the evidence."[9] In that case, the plaintiff was stopped or stopping when her vehicle was struck from behind by the defendant's vehicle. Immediately following the accident, the plaintiff was "shaken up" but did not believe she was injured. However, several hours later she began experiencing back pain and went to a nearby medical center for treatment. During the examination there, she complained of neck pain. The medical center prescribed pain medication and released her. When the pain had not subsided after a few days, she went to her personal doctor, who prescribed rest, medication and physical therapy with a chiropractor. The chiropractor treated her for about two months. At

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[7] *Id.* at 749.

[8] *Amalfitano v. Baker*, 794 A.2d 575, 578 (Del. 2001).

[9] *Id.* at 575.

trial, the plaintiff testified that she continued to experience pain and had not been able to return to her pre-accident routine. The doctor and the chiropractor testified at trial that in addition to noting the plaintiff's subjective complaints of headache, back pain and neck pain, they detected spasm and limited range of motion through objective testing. They also testified that it was their opinion, based upon both the plaintiff's subjective complaints and the results of their objective tests, that the auto accident was the proximate cause of her injuries.

The defendant in *Amalfitano* attempted to distinguish *Maier* on the grounds that *Maier* involved "conclusive" evidence of injury caused by the accident because the doctor called by the defendant agreed that such injury existed, whereas *Amalfitano* involved only "uncontradicted" evidence of injury caused by the accident. In *Amalfitano*, apparently no doctor was called by the defense. The Supreme Court rejected this distinction, and held that 'uncontradicted medical evidence of injuries and their proximate cause, confirmed by independent objective testing, meet the standard of 'conclusive' evidence of injury that would require a reasonable jury to return a verdict of at least minimal damages."[10] The court noted that "[t]he defense presented the jury with *no basis upon which to reject* Amalfitano's uncontradicted subjective complaints, the confirmatory objective findings of her medical experts, or their ultimate findings that she suffered injuries proximately caused by the accident."[11]

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[10] *Id*. at 577.

[11] *Id*. at 578.

A judge of the Superior Court has observed that "*Maier* and *Amalfitano* clearly stand for the proposition that unrebutted medical expert opinion supported by objective tests is conclusive."[12]

The trend set by *Maier* and *Amalfitano* continues with the recent case of *Sullivan v. Sanderson*.[13] In that case the defendant admitted negligence but the jury returned a zero verdict, specifically finding that the auto accident involved there did not proximately cause the plaintiff's injuries. The plaintiff's doctor testified that he conducted a physical examination of the plaintiff, which revealed "tenderness with some spasm, meaning the muscles were extremely tight and in contraction."[14] The Supreme Court stated that "[w]e have recognized a doctor's findings of 'spasms' reflects objective testing."[15] The Supreme Court remanded with instructions that the trial judge:

> re-examine the record in light of *Amalfitano* and this Order and determine whether there is testimony in the record contradicting the plaintiff's expert testimony based upon objective findings of muscle spasm; and if so was it credible evidence upon which a reasonable juror could reject a plaintiff's proffered evidence of injury

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[12] *Redden v. Amalfitano*, 2002 Del. Super. LEXIS 168 at *1-2. The reappearance of the name "Amalfitano" is apparently a coincidence.

[13] *Sullivan v. Sanderson*, 2002 Del. Lexis 795.

[14] *Id*. at *3.

[15] *Id*. at *3 quoting *Amalfitano*, 794 A.2d at 576.

proximately caused by the accident.[16]

The defendant argues that proximate causation is ordinarily a question of fact for the jury to determine; that there were inconsistencies in the testimony of the plaintiff and her husband which placed their credibility in issue; that spasms are not necessarily caused by an acute injury and could have been caused by the plaintiff being transported to the emergency ward on a backboard with a cervical collar; and that there was evidence that the defendant had back problems prior to the accident. He also argues that without objection the jurors were instructed on proximate causation, instructed that "instructions about the measure of damages are given for your guidance only if you find that a damage award is in order," instructed that they should give expert testimony whatever weight and credit they thought appropriate, which includes, by inference, no weight at all, and given an interrogatory which specifically asked the jury whether it found that the accident was the proximate cause of injury to the plaintiff. He contends that by agreeing to these instructions and the jury interrogatory, the plaintiff has waived any objection to the jury's "no" answer to the interrogatory. He also argues that he never conceded that the plaintiff had received any injuries in the accident. He also relies on a "long line" of cases which have upheld jury verdicts.

Notwithstanding the defendant's arguments, I believe that the evidence of a neck injury, consisting of the plaintiff's complaints of neck pain following the accident, the emergency ward doctor's physical examination of the plaintiff that day

[16] *Id.*

which showed muscle spasm and decreased range of motion in the neck, Dr. Beneck's physical examination of the plaintiff four days later which showed a 50% limitation in range of motion of the neck, and Dr. Beneck's opinion that the neck pain was caused by the accident, required the jury to return a verdict of at least minimal damages under *Maier-Amalfitano-Sullivan*, even though the neck injury resolved itself within about three months. The cases relied upon by the defendant pre-date the cases just mentioned and are factually distinguishable.

Therefore, the plaintiff's motion for a new trial is ***granted***.

IT IS SO ORDERED.

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Resident Judge

oc: Prothonotary
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