SUPERIOR COURT
OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: September 12, 2003
Decided: December 29, 2003

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Re: *Marefat v. Fiala, C.A. No. 00C-11-045-FSS*
Upon Plaintiff's Motion for a New Trial – ***DENIED***

Dear Counsel:

This decides Plaintiff's Motion for a New Trial.[1] As you know, Plaintiff's motion essentially rests on two grounds. First, Plaintiff alleges that *Davis v. Maute*[2] applies. Because Defendant did not present a biomechanical expert, the court tried to prevent the defense from improperly minimizing the collision as a

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

[2] 770 A.2d 36 (Del. 2001).

fender-bender. Nevertheless, Defendant volunteered to the jury that she was "surprised" to be testifying four and a half years later "because Mrs. Marafat had a scratch on her bumper." The defense also, allegedly, referred to the extent of damage during its closing argument. The second basis for Plaintiff's motion is the court's decision to instruct the jury on pre-existing damages. Plaintiff contends that there was no medical testimony about that. Therefore, the jury was left to speculate about the pre-existing injury's extent and its relation, if any, to Plaintiff's physical complaints.

Defendant offers two responses to Plaintiff's motion. First, Defendant correctly observes that Plaintiff remained silent when the *Davis* problems arose during Defendant's testimony. That violated Delaware's well established contemporaneous objection rule.[3] Second, Defendant reminds the court that the jury was instructed about pre-existing injury because there was evidence that Plaintiff had one.

During her direct testimony, Plaintiff described the accident, a rear-end collision, and the violent force to which she was subjected. Specifically, Plaintiff testified:

> I went up and down and front and back, just shook, and the impact was very, very hard.

Plaintiff also testified that the impact left her "dazed" and "in shock."

When Defendant tried to counter Plaintiff's testimony, relying on *Davis*, the court refused to allow Defendant either to introduce photographs of the damaged

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[3] See *Lougheed v. Medical Center of Delaware, Inc.*, 1994 WL 682455 (Del. Super.), *aff'd Medical Center of Delaware, Inc. v. Lougheed*, 661 A.2d 1055 (Del. 1995) (party's failure to object constitutes waiver and eliminates court's best chance to correct error).

cars or to tell the jury that the total damage to both cars was around $1,000. Instead, the court allowed Defendant to testify that the collision was insignificant. When Defendant's turn to testify came, however, she not only told the jury the collision was insignificant, without being asked she volunteered about damage to Plaintiff's car, "Mrs. Marefat had a scratch on her bumper." The isolated, non-responsive comment about damage to Plaintiff's car was far less egregious than what happened in *Davis*. The comment about the scratch was a single remark made in court, as opposed to the introduction of photographs and argument in opening and closing. Moreover, the circumstances of the collision were raised more directly by Marefat than by Davis.

Nevertheless, the comment about the scratch arguably was a *Davis* violation. As mentioned, however, Plaintiff chose not to object. Had Plaintiff objected, the court could have given an effective curative instruction on the spot. The court also notes that it will be almost impossible to enforce *Davis* against lay witnesses. Whether defendants are careless or calculating, comments like Defendant's will happen. The court does not read *Davis* to require a mistrial at the mere mention of damages by a wayward litigant, especially when it draws no objection. Considering the actual *Davis* violation and taking its genesis into account, this is a good case to enforce the contemporaneous objection rule.

Alternatively, the court made an extensive record explaining why it would not allow Defendant to introduce evidence about damages. After review of the record, the court believes that its evidentiary ruling was too cautious. Taking Plaintiff's dramatic account of the collision into account, testimony that the collision caused, at most, minor damage tends to impeach Plaintiff's credibility. Upon reflection, the scale in this case is weighted differently under D.R.E. 403 than it was in *Davis*.

Implicit in the court's revised ruling is its understanding that, according to *Davis*, absent expert testimony a jury cannot correlate damage to a car with resulting physical injury. Nonetheless, in cases like this one, a jury can make some

correlation between a plaintiff's dramatic recounting of a collision and the resulting, minor damage to a car. While jurors are not accident reconstruction experts, as ordinary lay people they can compare a Plaintiff's claim that she was thrown around – up and down, back and forth – with the resulting minor damage to the cars, and use that comparison to assess the parties' credibility.

In summary as to *Davis*, the court is satisfied that if there were a *Davis* violation, it was trivial, demonstrated by counsel's failure to object to it. Moreover, the court does not agree that there was a violation because the single comment by Defendant about damage responded to Plaintiff's claim.

Furthermore, the court continues to hold that the instruction on pre-existing injury was helpful. There was testimony that Plaintiff's significant, physical injury claims had other causes, such as disc problems. And, even if Defendant's expert did not attribute them to pre-existing injury, he diagnosed Plaintiff with strain and sprain that resolved appropriately. The instruction told the jury, in effect, that if it believed that Plaintiff had a bad back, she was only entitled to compensation for damage caused by the collision.

At trial, the parties presented dramatically different views about the collision and its consequences. The parties presented dramatically different medical opinions, too. Basically, Plaintiff tried to prove that the collision was strong enough that it caused a herniated disc, which resulted in substantial medical damages. Plaintiff tried to prove her claim through her testimony about the force of impact and a medical expert who attributed her disc problems to the force of impact, as Plaintiff described it to him. The jury saw the parties testify. While the jury could have relied on Plaintiff's testimony about the force of impact and awarded substantial damages, her evidence did not satisfy the jury that Plaintiff proved her case.

The court presided over the trial and it has reviewed the record carefully. Despite Plaintiff's obvious sincerity, the evidence she presented about the force of

impact was not strong, and her expert relied, in part, on it for his opinions. Moreover, Defendant's evidence supported a finding that the collision only caused a strain and sprain, which resolved. The jury obviously did not find that Plaintiff's evidence met her burden of proof. The court will not set aside the jury's verdict.

For the foregoing reasons, Plaintiff's Motion for a New Trial is ***DENIED***.

IT IS SO ORDERED.

Very truly yours,

FSS/lah
oc: Prothonotary (Civil Division)

tickle file for 45 days from 12/16/03 for Defendant's status letter = 1/30/04
Plaintiff shall file a status letter forty-five days after that = 3/15/04.