IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARK BEATTY AND MARY BEATTY, husband and wife,	)	
Plaintiffs,	)	
v.	)	C.A. No. 00C-06-060-JRS
DEBORAH SMEDLEY,	)	
Defendant,	)	
v.	)	
MARK BEATTY,	)	
Counterclaim Defendant.	)	

Date Submitted: December 23, 2002
Date Decided: March 12, 2003

MEMORANDUM OPINION

Upon Consideration of Plaintiffs' Motion for Reargument.
DENIED.

Donald E. Evans, Esquire, EVANS & ASSOCIATES, Two Mill Road, P.O. Box 550, Wilmington, Delaware, 19899-0550. Attorney for the Plaintiffs.

Edward F. Kafader, Esquire, FERRY, JOSEPH & PEARCE, 824 Market Street, P.O. Box 1351, Wilmington, Delaware, 19899. Attorney for the Defendant.

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SLIGHTS, J.

Facts

The jury in this personal injury case returned a verdict in favor of the defendant, Deborah Smedley, after finding that her negligence did not proximately cause injury to the plaintiff, Mary Beatty.[1] On July 12, 2002, the Court, by oral ruling, denied plaintiffs' motion for new trial. The Court held that even though the plaintiffs' medical experts opined that plaintiff exhibited objective signs of injury, the jury, nevertheless, could have rejected that testimony because the defendant had demonstrated that the expert opinions were not based on reliable information. The Court concluded, in other words, that even though the opinions were unrebutted by defense expert testimony, the jury could reject the plaintiff's experts' opinions if it had a reasonable basis to conclude the opinions were not reliable or credible.

The testimony at trial revealed that neither of plaintiff's experts had been made aware of the full extent of her pre-existing neck injury prior to reaching their opinions that her neck injury was caused by this accident. Once confronted during trial with the medical records depicting the prior injury, including records which recorded prior objective signs of injury similar to those encountered by the doctors after this accident, the experts refused to acknowledge that the pre-existing injury was in any

[1]The plaintiffs are Mary Beatty and her husband, Mark Beatty. Mrs. Beatty made the claim for personal injuries; her husband alleged a derivative loss of consortium claim. The Court will refer only to Mrs. Beatty's claims when referring hereinafter to "plaintiff."

way significant. In the context of this record, the Court determined that the jury may well have perceived that "the experts were taking the stand without complete information [and], after having committed themselves to a position, they refused to acknowledge the potential importance of the additional information."[2]

In addition to forming opinions with less than a complete foundation, the experts also offered arguably incredible excuses for the plaintiff's failure to disclose her pre-existing injuries to her doctors when she first sought treatment from them. When confronted with forms completed in the plaintiff's own hand, in which she clearly denied pre-existing injuries, both experts attempted to justify her failure to acknowledge pre-existing injuries by characterizing the questions on the forms as complicated when they were not and by explaining that patients often fail to focus when providing medical history. The jury readily could have concluded that these explanations were not credible.[3]

Finally, the jury watched as one of the plaintiff's experts was forced to concede during cross examination that one of his pretrial opinions was not well founded. Dr.

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[2]D.I. 62, Transcript of Court's Ruling on Plaintiffs' Motion for New Trial, at 3 (July 12, 2002).

[3]In essence, plaintiff's experts explained that it is common for patients not to focus on their answers to medical questionnaires or to misunderstand what is being asked of them on the forms. Defense counsel argued to the jury in closing that in view of the very clear questions on the form and the importance of the history-taking process, the experts' explanations for plaintiff's contradictory responses on the form were not reasonable.

Banderas initially opined that the plaintiff had suffered a permanent injury to her low back as a result of this accident. On cross examination, upon learning that the plaintiff had not experienced any symptoms in her low back for some time, Dr. Banderas had no choice but to acknowledge that his previous opinion was wrong.

In denying the motion for new trial, the Court determined that by the time the evidence closed, the jury reasonably could have concluded that the plaintiff's experts had rendered their opinions with less than complete information and that one of the experts had overstated his opinion with respect to the extent of the injuries caused by the accident. Under these circumstances, it was quite reasonable for the jury to question the accuracy and/or objectivity of the expert's opinions.

Plaintiffs have moved for reargument on the grounds that: (1) the Court misapprehended the extent of the testimony regarding objective signs of injury in this case and (2) the Court misapprehended the extent to which it may sanction a defense verdict when the jury has found that the defendant was negligent and has heard unrebutted evidence of objective signs of injury caused by the accident. After reviewing the parties' submissions and more thoroughly reviewing the trial record, the Court remains convinced that a jury may reject a medical expert's opinions regarding objective signs of injury when defense counsel has raised legitimate questions regarding the expert's credibility during cross examination and through

other evidence presented at trial. Accordingly, the motion for reargument is **DENIED.**

Standard of Review

"A motion for reargument is the proper device for seeking reconsideration by the Trial Court of its findings of fact, conclusions of law, or judgment.... The manifest purpose of all Rule 59 motions is to afford the Trial Court an opportunity to correct errors prior to appeal...."[4] "A motion for reargument is not a device for raising new arguments or stringing out the length of time for making an argument. It will be denied unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[5]

Discussion

Plaintiffs rely principally upon the Supreme Court of Delaware's decision in *Amalfitano v. Baker,*[6] where the Court held that a jury may not reject an uncontradicted expert opinion regarding injury if the opinion is based in part upon

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[4]*Cummings v. Jimmy's Grille, Inc.*, 2000 Del. Super. LEXIS 253, at *5 (quoting *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969)).

[5]*DELJIS v. Gannett Co.,* C.A. No. 01C-01-039, Witham, J. (Del. Super. Jan. 17, 2003)(Mem. Op. at 4)(citations omitted).

[6]794 A.2d 575 (Del. 2001).

objective signs of injury. *Amalfitano* is now oft-cited and well settled.[7] Citing *Amalfitano*, Plaintiffs contend that because their experts were able to support their opinions that the accident caused injury with references to objective signs of injury, including muscle spasms and diagnostic studies revealing abnormal findings, the jury was obliged to accept those opinions absent a credible expert presentation to the contrary on behalf of the defendant.

Defendant argues that *Amalfitano* does not go so far as to require a defendant in every case to produce a rebuttal expert in order to challenge the plaintiff's medical expert, even if the expert claims to have detected objected signs of injury. According to defendant, *Amalfitano* allows her to challenge the credibility of plaintiff's experts with effective cross examination alone and, if the effort is successful, the jury may, in turn, justifiably reject the expert's testimony altogether.

Defendant's argument finds support in *Amalfitano*. There, the Court specifically noted that defense counsel had made no effort to raise a credibility issue with respect to the plaintiff's medical experts.[8] That is not the case here. As noted

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[7] *See, e.g., Sullivan v. Sanderson*, 2002 Del. LEXIS 795 at *2-3 (ORDER).

[8] *See Amalfitano,* 794 A.2d at 578 ("Defense counsel failed to raise any credible issue about the motives of or suggesting any bias by the plaintiff's expert witnesses that could taint their testimony about the plaintiff's condition, the independent and objective nature of their examinations and tests or their ultimate conclusions that she suffered injury as a result of the April 1997 accident.").

above, defense counsel cross examined the plaintiff's experts extensively about the fact that they had reached their opinions without complete information regarding the extent of plaintiff's pre-existing injuries, and that at least one of them (Dr. Bandera) seemed willing to jump to conclusions (e.g. the permanent injury to the plaintiff's low back) which eventually proved to be wrong.

In *Amalfitano*, the Court concluded that the jury's "zero verdict" could not be upheld because the plaintiff's expert's unrebutted opinion amounted to "'conclusive' evidence of injury that would require a reasonable jury to return a verdict for at least minimal damages."[9] No such "conclusive evidence" of injury was presented in this trial; defense counsel's cross examination of the experts adequately challenged the foundation of their opinions such that the jury was free to question the experts' credibility and, ultimately, to reject their opinions.

The jury's verdict here is entirely consistent with its role as judges of the facts (including the credibility of witnesses). As explained in the Court's civil "Pattern Jury Instructions," at §§ 23.9 & 23.10:

> You are the sole judges of each witness' credibility. You should consider each witness' means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony

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[9] *Id.* at 577 (referring to the standard articulated in *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997), where the Court held that "uncontradicted medical testimony" supporting a causal link between injury and accident requires an award of some damages).

> is; whether it is consistent or inconsistent; whether it has been contradicted; the witness' biases, prejudices or interests; the witness' manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.
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> In weighing expert testimony, you may consider the expert's qualifications, the reason's for the expert's opinions, and the reliability of the information supporting the expert's opinions, as well as the factors I have previously mentioned for weighing the testimony of any other witness. Expert testimony should receive whatever weight and credit you think appropriate, given all the other evidence in the case.

The Court's pattern instructions memorialize a fundamental concept: in trials by jury, the jurors, not the judge, determine when a witness - - including an expert witness - - is credible and when the witness is not credible.[10] These pattern instructions were

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[10] *See, e.g., Scullari v. United States,* 2000 U.S. App. LEXIS 3416, at *6-7 (2d Cir. 2000)(the "fact finder is always free to reject, in whole or in part, expert testimony and arrive at an independent conclusion"); *Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 795 (6th Cir. 1995)(in denying plaintiff's motion for new trial and post-trial judgment as a matter of law, the court agreed that the defendant "had raised a question as to the credibility of plaintiffs' expert witness through cross-examination and had offered contrary evidence, and the jury was free to reject plaintiffs' evidence even if it was uncontradicted."); *United States v. Jackson,* 425 F.2d 574, 577 (D.C. Cir. 1970)(deciding that trial court correctly instructed jury that "the weight, if any, to be given his expert testimony was exclusively for the jury's determination"); *Harmston v. Agro-West, Inc.*, 727 P.2d 1242, 1247 (Idaho Ct. App.1986)("The credibility and weight of expert testimony, once an expert has been qualified, is exclusively a matter for determination by the jury....An expert's opinion is not binding on the jury and may be rejected even when uncontradicted.")(citations omitted); 75A AM. JUR. 2d *Trials* §744 (1991)("The weight to be given to the testimony of an expert or of an interested witness is for the determination of the jury."). Delaware, too, has embraced the jury's exclusive province to determine issues of credibility. *See, e.g., Baylis v. Wilmington Medical Center, Inc.*, 1989 Del. LEXIS 290, at *3-4 (Del. Supr.)(concluding that the jury acted properly by resolving the issues of credibility and conflict among the expert witnesses' testimony); *Savage v. Cooke*, 1995 Del. Super. LEXIS 595, at *1 (trial judge noted that plaintiffs appeared credible to him at trial "but, in a jury case, it is not my factual judgment that is crucial"); *DeAngelis v. Harrison*, 1992 Del. Super. LEXIS 322, at *5 ("The jury is free to accept or reject testimony of all witnesses, including

proposed jointly by the parties in this case and read to the jury without objection.[11] In compliance with the Court's instructions, the jury properly exercised its prerogative to reject the testimony of plaintiff's experts in the face of significant evidence undermining their credibility. The Court's conscience is not shocked by this result; the verdict will not be disturbed.[12]

Conclusion

This Court previously has observed that motions for new trial have become the norm after parties to personal injury litigation are on the receiving end of jury verdicts which do not meet their expectations.[13] This trend has not been lost on other judges of this Court.[14] Trial judges must resist the temptation to substitute their own judgment for the judgment of the jury when the verdict finds support in the evidence.

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experts.").

[11] *See* D.I. 48, at 11.

[12] *See Porter v. Murphy*, C.A. No. 99C-08-258, Cooch, R.J. (Del. Super. Oct. 2, 2001)(Mem. Op. at 3-4)("A jury's [verdict] is presumed correct and just unless so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice.").

[13] *See Dunckle v. Prettyman*, C.A. No. 99C-10-265, Slights, J. (Del. Super. May 1, 2002)(Letter Op. at 8 n. 10)("Remarkably, this judge has seen a motion for new trial following every jury verdict he has taken over the past 17 months which resolved claims of personal injuries involving disputed damages."). With this case, the trend remains unbroken.

[14] *See, e.g., Hartnett v. Romspert*, 1995 Del. Super. LEXIS 596, at *1 (Judge Quillen observed: "This Court is bombarded by post-trial motions by disappointed plaintiffs on the issues of weight of evidence and/or damages.... [W]hat is frustrating is the continuing anticipation that somehow the Court can automatically make real the plaintiff's expectation after a jury has decided to the contrary.").

As Judge Quillen observed: "[t]rials involve risk and those of us involved in the judicial system cannot make litigation risk free. Regardless of how sympathetic the Court may be toward the plaintiff's cause, the Court is not free to ignore the legitimate role of the jury."[15]

The Court is satisfied that the jury's verdict in this case was not inconsistent with *Amalfitano*. Instead, it was the product of informed deliberation and reflected the jury's understanding of its obligation to judge the credibility of all witnesses, including experts. Accordingly, plaintiffs' Motion for Reargument must be **DENIED.**

IT IS SO ORDERED.

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Judge Joseph R. Slights, III

Original to Prothonotary

[15] *Id.*