

**SUPERIOR COURT
of the
STATE OF DELAWARE**

Susan C. Del Pesco
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Submitted: May 6, 2004¹
Decided: June 16, 2004

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Re: *Susan J. Klint and Francis J. Klint v. Shannon M. Brennan*
Civil Action No. 99C-09-022 SCD

Upon Consideration of Plaintiff's Motion for New Trial and/or Additur -- DENIED

Dear Counsel:

Plaintiff has filed a motion for new trial and/or additur. On October 3, 1997, Susan J. Klint ("plaintiff") was struck from the rear by a vehicle operated by the defendant. She claimed personal injuries, future medical costs, and a loss of earning capacity. Her husband claimed a loss of consortium.

¹ The motion was timely filed and a timely response was received. Through error, the docket was closed, exhibits returned. The motion papers were misplaced. Counsel brought the fact that their motion remained undecided to the Court's attention by letter from Mr. Haley dated May 6, 2004. Counsel assisted by providing duplicate copies of their papers and returning exhibits. The Court regrets the delay and apologizes to counsel and their clients.

On November 3, 2003, a jury trial commenced. Because liability was not disputed, the case focused on causation and damages. At trial, plaintiff offered the testimony of three medical experts, a vocational expert and an economist, who testified to plaintiff's accident related injuries and her economic loss. Defendant cross-examined these witnesses, but offered no witnesses on her own behalf. At the close of trial, the jury returned a verdict for the plaintiff in the amount of \$30,000, and a verdict of zero dollars for her husband.

Under Delaware law, enormous deference is given to jury verdicts.² A jury award should be set aside only in the unusual case where it is "clear that the award is so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice."³ This standard is met when the award is so inadequate that it must have been based on passion, prejudice or misconduct rather than on an objective consideration of the trial evidence.⁴

The accident occurred on October 3, 1997. At trial, plaintiff claimed soft tissue injuries as well as injury to both feet. The first treatment the plaintiff received was four days after the accident when she went to the Emergency Room at Riverside Medical Center. At that time she complained of "pain all over." The diagnosis was whiplash syndrome secondary to motor vehicle accident. The report from that visit notes a twisted *left* foot; there was no report of *right* foot injury. On October 31, 1997, when she filled out a form to collect PIP benefits, she identified her injury to be "pain in right jaw, neck, shoulder, lower mid back, left finger, arms, knees, tops of knees, shins, ankle & foot. Black and blue on body parts arms, legs, ankle—soft tissue damage-TMJ. Whip lash." The defense noted, and argued with regard to causation, the

² *Young v. Frase*, 702 A.2d 1234, 1236-37 (Del. 1997).

³ *Id.*, quoting *Mills v. Telenczak*, 345 A.2d 424, 426 (Del. 1975).

⁴ *Id.* at 1237.

fact that the form plaintiff completed mentioned *ankle and foot* under the category of injuries, singular, not plural. Also key to the defense was the fact that the plaintiff did not seek further treatment for over six months.

Plaintiff offered the deposition testimony of Lawrence J. Bellew, D.O., an osteopathic physician who began treating plaintiff on April 22, 1998. Plaintiff's initial complaints were of thoracocervical pain which Dr. Bellew defined as pain at the junction of the neck and the rib cage and the shoulders, which was worse with rotation of her neck to the left. She also complained of pain in the right side of the cheek, the left arm and shoulder, the low back and both feet. The plaintiff associated the pain with her accident of October 3, 1997.

Dr. Bellew noted that when plaintiff explained the accident, which involved a rear end collision occurring next to a stopped school bus -- the plaintiff fearing that her car would be driven into children crossing in front of her -- she had a change in her affect, indicating that it was emotionally upsetting for her. The history taken by the doctor notes that the plaintiff had been trying to avoid treatment, relying on advice that she would eventually get better. Further, she was disinclined to take medication due to multiple allergies.

Dr. Bellew's examination detected asymmetry at multiple locations in her body. His diagnosis was strain and sprain injury to the sacroiliac, lumbosacral, thoracic and thoracocervical area. She also had suffered contusion of the left arm and shoulder, hip, and thigh. He treated her twice in April and eight times in May. At one of the May visits, the plaintiff reported a worsening of her right foot and ankle after being on her feet for most of the weekend. The doctor continued to treat her in June and July. At one of the June visits she complained of increased pain and swelling in both feet, more pronounced on the left, as a result of standing for a prolonged period during funeral services for her mother. At a later session, she complained of

pain with prolonged weight bearing in the right ankle as well as pain and swelling and black and blue appearance to the first and second toes of the left foot after three hours of weight bearing. Dr. Bellew decided to refer the plaintiff to a podiatrist. His care of the plaintiff ended with the visit of July 24, 1998, by which time he had corrected the asymmetries he had detected at the time of her first visit. The doctor testified that the only information he had regarding the source of the various complaints was what the plaintiff told him. His records noted that his treatments provided temporary improvement of her symptoms, with a return of symptoms when she resumed weight bearing and became active.

In July 1998, she came under the care of a podiatrist, Dr. Raymond V. Feehery, who began to treat both feet. As to the left foot, the doctor found a fracture fragment in the first metatarsal-phalangeal joint (big toe). Surgery to the left foot was performed in September 1998 to remove the fracture fragment. The left foot problem is complicated by progressive arthritis of the joint. A joint fusion has been discussed but not undertaken as of the date of the trial.

With regard to the right foot, Dr. Feehery described a congenital abnormality to the foot, an extra bone at the navicular, and opined: "But the injury is such that people can have that condition without it being injured, but they are more susceptible to a twist or a turn or a sprain type of injury waking that up and causing chronic pain." After immobilization of the right foot failed to relieve the pain, the doctor did surgery in February 1999. The extra bone was removed. The plaintiff has persistent pain in both feet.

The doctor associated both foot injuries with the accident. The doctor also said that if the right foot injuries were associated with the accident, he would expect symptoms to appear within four weeks of the accident. The significance of that testimony is that the PIP form completed twenty-eight days after the accident did not specifically reference her right foot.

As to future medical expenses, Dr. Feehery testified that the treatment would include office visits and periodic replacement of her orthotics for the rest of the plaintiff's life.

In addition to the foot injuries, the plaintiff experienced soft tissue injuries to the neck and back. Dr. Asit Upadhyay, who began treating her for left elbow pain, jaw pain, and back pain in July 1999, testified he treated the plaintiff with medication and therapy. Her objective complaints were confirmed by MRI studies, and objective findings of spasm. He expressed the opinion that the plaintiff has cervical spine pain secondary to strain/sprain and that she has components of cervical discogenic pain from a herniated disc. In her low back, she has chronic lumbosacral strain and sprain and SI joint dysfunctions due to her muscle imbalance. She has chronic bilateral ankle pain and anxiety reactive to her chronic pain. The doctor found all of her problems to be related to the accident of October 3, 1997.

Dr. Upadhyay's records indicate that by October 1999, plaintiff's neck and back strains were "resolving nicely." The March 2000 note indicates that the plaintiff "was doing well with only occasional neck or low back stiffness." Plaintiff was instructed to do home exercises and return in a few months. The plaintiff stopped doing the home exercises, she explained that it was due to the direction of a cardiologist who did not testify. When she returned to Dr. Upadhyay her condition was worse, as the doctor had predicted would occur if she did not do her home therapy. The testimony from the plaintiff was that she was later cleared by her cardiologist to resume her home care.

The plaintiff made a claim for lost earnings. She testified that prior to the accident she had intended to return to teaching after a lengthy hiatus. Economic testimony, based on the assumption that she would be capable of working as a school teacher on a full-time basis was \$324,417 in lost earnings. Alternatively, \$239,848 would be lost if she returned to teaching on a

part time basis. Her work-life from trial to age 62 was approximately 5 1/2 years.

At trial, the defendant accepted responsibility for the accident. No medical experts were called by the defense. The defense was focused on undermining the credibility of the plaintiff, and her physicians as to **causation**. There were two compelling factors in the defense arsenal. One was the delay between the accident and the onset of active treatment, the second was the fact that the onset of severe foot problems was documented by the podiatrist and associated with unusually lengthy weight bearing incidents. There was no evidence that the plaintiff had pre-existing injuries of the type complained of at trial prior to the accident.

There is a basis in the record for the jury to reject the onset of all but the soft tissue injuries associated with this accident. There is also a basis on which the jury could have concluded that the plaintiff failed to mitigate her damages when she terminated the exercise regime prescribed by her physician.⁵ Finally, there is a basis for rejecting the claim for future lost wages based on the plaintiff's history in the employment market and the fact that her projected earnings were based on an aspiration, rather than actual employment.

I find the verdict returned not to be grossly out of proportion to the factual conclusions the jury could have made.⁶ I reject as improper the affidavit offered by the economic expert, David E. Black, who encountered a juror after the trial, and discussed the deliberations with her.

The motion for new trial or, alternatively, for additur, is DENIED.

IT IS SO ORDERED.

⁵ As to mitigation, the jury was instructed:

MITIGATION OF DAMAGES -- PERSONAL INJURY

An injured party must exercise reasonable care to reduce the damages resulting from the injury. If you find that Susan Klint failed to seek or accept reasonable medical treatment to reduce her damages, then any damages resulting from that failure are not the responsibility of Shannon Brennan and should not be included in your award.

⁶ *Amalfitano v. Baker*, 794 A.2d 575, 578 (Del. 2001).

Very truly yours,

/s/

Susan C. Del Pesco

Original to Prothonotary