IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHELE SUNSTROM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 02C-02-141 MMJ
	)	
DAVID L. ROBINSON,	)	
	)	
Defendant.	)	

Submitted: November 12, 2004
Decided: December 21, 2004

UPON DEFENDANT'S MOTION FOR NEW TRIAL/ADDITUR

MEMORANDUM OPINION

Jeffrey S. Welch, Esquire, Welch & Associates, Wilmington, Delaware, Attorney for Plaintiff

David G. Culley, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware, Attorney for Defendant

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Michelle Sunstrom ("Plaintiff") brought an action for personal injuries against David L. Robinson ("Defendant"), arising out of a motor vehicle accident that occurred on March 8, 2000. The jury rendered its verdict on September 23, 2004, determining that Plaintiff was not contributorily negligent. The jury found in favor of Plaintiff in the amount of $69,600.

Plaintiff filed a Motion for an Additur to the Judgment and/or New Trial on the Issue of Damages on October 1, 2004. Plaintiff claims that as a result of Defendant's negligence, Plaintiff has suffered and will continue to incur substantial medical expenses and lost income in the future. Plaintiff claims that the loss of earnings has a present value of at least $500,000 and that the present value of future medical expenses $117,744. Plaintiff requests that the Court grant an additur of at least $583,000 to the jury's verdict in order to correct the original damages award, which is against the great weight of the evidence, and not within the range of any damages submitted to the jury.

During the trial, Plaintiff's treating neurologist, Bruce H. Grossinger, D.O. testified by video deposition. Some of Dr. Grossinger's findings are as follows:

- Subsequent to the March 18, 2000, accident, Plaintiff had radiating neck pain into the arms and hands, with alternating intensity. There was an actual break of the bone in the neck, as well as a herniated disc.

- Plaintiff had weakness of the right shoulder, the deltoid muscle, the forearm muscles, with a diminished right biceps reflex, as well as spasms of the neck and reduced mobility of the right shoulder.
- Plaintiff had an abnormal EMG showing nerve damage of the right lateral cord of the brachial plexus, a very important branch of the nerves underneath the armpit.
- Plaintiff had a diminished response to the electric shock down to 4.2 microvolts, which is statistically significant.
- Plaintiff had additional injuries, including the herniated disc at C5-6, with impingement, as well as the fracture of the spine.

Douglas R. Briggs, D.C., Plaintiff's treating chiropractor for last 3 years, also testified for Plaintiff. Plaintiff's expert economist was Jerome M. Staller, Ph.D. , who testified as to the present value of Plaintiff's lost income and present value of Plaintiff's future medical expenses. Plaintiff's mother and aunt testified that Plaintiff was unable to get out of bed for approximately three weeks immediately after the accident, and is a mere shadow of herself today. Plaintiff's young son, Eric R. Sunstrom, Jr., testified to the same effect. A March 9, 2000 record from Christiana Hospital indicates that Plaintiff's neck injuries had been misdiagnosed and that she had in fact suffered herniated discs at C5-C6 and C6-C7.

Some of the findings by Defendant's medical expert, Dr. Richard Katz, are as follows:

- There was no clinical or radiological evidence that Plaintiff sustained a fracture of the C6 spinous process.
- There was no clinical or radiological evidence that the "small" or "very small" cervical disc herniations were clinically significant or contributing to any of Plaintiff's symptoms.
- There was no clinical or diagnostic evidence of a brachial plexus injury or thoracic outlet syndrome that could be directly related to the motor vehicle accident.
- The electrodiagnostic data Dr. Grossinger relied upon to diagnose a brachial plexus injury or thoracic outlet syndrome was inadequate and internally inconsistent. The EMG findings could not be explained in light of the nerve conduction findings.
- The most likely diagnosis attributable to any injury sustained by Plaintiff in the March 8, 2000 accident was that of a cervical sprain and strain injury.
- Plaintiff did not need any additional medical care or treatment for her accident related injuries as of the date of Dr. Katz's examination on July 20, 2002.
- Plaintiff was capable of working on a full-time basis in whatever capacity she

chose without medical limitation or restriction as of July 30, 2002.

STANDARD OF REVIEW

A jury verdict will be set aside when, in the judgment of the trial judge, the verdict "is at least against the great weight of the evidence. In other words, barring exceptional circumstances, a trial judge should not set aside a jury verdict on such grounds unless, on a review of all the evidence, the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result."[1] The Court should be reluctant to draw a conclusion different from the jury on a disputed question of fact when the subject matter is within the normal comprehension of a jury and the evidence in the case is not particularly complex.[2]

A motion for new trial or additur is directed to the sound discretion of the trial court.[3] It is fundamental that the evidence must be reviewed in the light most favorable to the prevailing party.[4] Where a motion for new trial is directed, as here, to the amount of the verdict alone, as opposed to some other legal issue, the motion is subject to the same standard of review as a motion for additur or remittitur. This

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

[2] *See id.* at 466-67.

[3] *Broderick v. Wal-Mart*, 2002 WL 388117, at *2 (Del. Super.); *Clough v. Wal-Mart*, 1997 WL 528313, at *1 (Del. Super.), *aff'd,* 712 A.2d 476 (Del. 1998).

[4] *Broderick*, *supra*., at *2; *Clough*, *supra*., at *1.

Court has the discretion to grant a motion for additur when, after reviewing the record, the Court makes a determination that the award of damages is not within the range supported by the evidence.[5] As with a motion for new trial, this Court in determining an additur motion must grant the defendant any reasonable inference and determine what verdict justifies as an absolute minimum under the facts.[6] The issue is whether the amount of the award is so grossly out of proportion to the injuries suffered so as to shock the Court's conscience and sense of justice and the injustice is clear.[7]

DISCUSSION

Plaintiff claims that the Court should grant Plaintiff's motion for new trial/additur because there is no apparent relationship between the jury award of $69,600 and any of the special items put before this jury. Plaintiff asserts that the jury award is clearly against the great weight of the evidence. Additionally, the jury

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[5] *Matusky v. Bonsall*, 2003 Del. Super. LEXIS 42.

[6] *Reusch*, 2002 WL 31375782, at *1; *see also Petrova v. Stephenson*, 2002 WL 31818518, *2 (Del. Super.).

[7] *Reusch v. Pennington-Bond*, 2002 WL 31375782, at *1 (Del. Super.); *Hall v. Dorsey*, 1998 WL 960774, at *3 (Del. Super.)("Additur in Delaware is appropriate when the award is so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice"); *Moffitt v. Carroll*, 640 A.2d 169, 176 n.2 (Del. 1994); *Burns v. Delaware Coca Cola Bottling Company*, 224 A.2d. 255, 258 (Del. Super.1966); *see also Lacey v. Beck*, 161 A.2d. 579, 581 (Del. Super. 1960)(when there is any margin for a reasonable difference of opinion in the matter, the Court should always yield to the verdict of the jury).

award of damages is not within a range supported by the evidence, as required by *Matusky v, Bonsall*.[8]

In *Matusky*, the defendant's negligence proximately caused injury to the plaintiff. The plaintiff had been involved in at least four accidents before the accident involving the defendant. The nature and extent of the injuries suffered by the plaintiff, as well as the nexus of the injuries to the subject accident, as opposed to the prior accidents, were in dispute. The *Matusky* jury rendered a verdict in favor of the plaintiff and awarded plaintiff $3,424.64. The plaintiff filed a motion for additur. The Court summarily granted the motion because the jury's award bore no apparent relationship to any of the medical testimony or special items of damage put before the jury.[9] The Court stated that the jury's award of $3,424.64 was so out of proportion to the injuries as to shock the Court's conscience and sense of justice.[10] The proper measure of damage was a compensation amount of no less than $ 60,000.00 in light of the medical expenses and the lost wages incurred, along with the pain and suffering experienced by the plaintiff as a result of the accident.[11]

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[8]2003 Del. Super. LEXIS, at *42.

[9]*Id.* at 44.

[10]*Id.*

[11]*Id.*

In the instant case, Plaintiff claims that as in *Matusky*, Defendant readily admitted that he was negligent, and Plaintiff proved various personal injuries. Also, Plaintiff was able to prove that she was not a malingerer, simply out to collect unemployment benefits and only work 20 hours per week for the rest of her life. Through her testimony, Plaintiff established that during the years 1990 through 1997, she worked full time and earned a substantial income. During 1998 and 1999, Plaintiff was employed in several temporary positions before securing a full-time position. The March 8, 2000 accident prevented Plaintiff from working on a full-time basis.

The jury heard conflicting evidence concerning Plaintiff's injuries. Dr. Grossinger, Plaintiff's expert, testified that subsequent to the March 18, 2000, accident, Plaintiff had radiating neck pain into the arms and hands, with alternating intensity. Also, there was an actual break of the bone in the neck, as well as a herniated disc. Dr. Katz, Defendant's expert, however, testified that there was no clinical or radiological evidence that Plaintiff had sustained a fracture of the C6 spinous process. Dr. Grossinger testified that Plaintiff had an abnormal EMG showing nerve damage of the right lateral cord of the brachial plexus. Dr. Katz found no clinical or diagnostic evidence of a brachial plexus injury or thoracic outlet syndrome that could be directly related to the motor vehicle accident. Dr. Katz

further found that Plaintiff did not need any additional medical care or treatment for her accident related injuries as of the date of his examination on July 20, 2002. According to Dr. Katz, Plaintiff was capable of working on a full-time basis in whatever capacity she chose without medical limitation or restriction as of July 30, 2002.

The jury, as finder of fact, was entitled to weigh the conflicting expert testimony. Clearly, the jury found Defendant's experts more compelling. Plaintiff's expert, Dr. Grossinger could not recall whether he ever personally reviewed any of the radiological studies in this case. No films of any radiological studies were shown to the jury, in order to demonstrate the alleged injuries or the extent of those injuries. Dr. Grossinger had no knowledge of any diagnosis of right-sided thoracic outlet syndrome pre-existing the March 8, 2000 motor vehicle accident. Notwithstanding, Plaintiff previously had been diagnosed with right-sided thoracic outlet syndrome by Dr. David Sowa in 1995. The EMG findings as diagnostic evidence of a brachial plexus injury or thoracic outlet syndrome could be explained by the prior diagnosis.

A reasonable jury could choose to disregard the testimony of Plaintiff's expert economist, Dr. Staller. Dr. Staller relied upon Plaintiff's 1999 earnings from an administrative assistant position from which Plaintiff was terminated, as well as unemployment compensation, in projecting future earnings loss. Plaintiff's past

employment history included frequent job changes and periods of unemployment. By Plaintiff's own admission, she sought no employment between September of 2000, when she was released to work by her family doctor, and November of 2001 when she began doing transcription work for her current client. Plaintiff also admitted that she had done nothing to seek out additional clients or work to increase her current hours from the five to ten hours of work she performs per week to the twenty hours her own medical expert says she can work.

For the first time, in Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for an Additur to the Judgment and/or New Trial on the Issue of Damages, Plaintiff has raised issues regarding allegedly improper statements made by Defendant's Counsel. Plaintiff's counsel did not object to the statements during trial. Assuming, *arguendo*, that Plaintiff is not deemed to have waived the right to object to Defendant's Counsel's remarks, the Court is satisfied that, in light of Plaintiff's testimony, the comments made by Defendant's Counsel were fair commentary on Plaintiff's claims.

CONCLUSION

The Court finds that the jury's verdict was consistent with the weight of the evidence. Additionally, the case was not especially complicated and was within the normal comprehension of a jury. The jury evaluated the credibility of the

witnesses and the evidence presented and reasonably returned a verdict in favor of Plaintiff in the amount of $69,600. The findings that Plaintiff was not contributorily negligent, and that Plaintiff is entitled to $69,600 in damages are not contradictory. These conclusions are not inconsistent with the evidence. A new trial on the issue of damages is not warranted. Additur will not be granted because the verdict is not so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice.

THEREFORE, Plaintiff's Motion for an Additur to the Judgment and/or New Trial on the Issue of Damages is hereby **DENIED**.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston

ORIGINAL: PROTHONOTARY'S OFFICE - CIVIL DIV.