IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

| | | |
|---|---|---|
| JEFFREY SHOCKLEY, | : | |
| | : | C.A. No. K13C-03-026 JJC |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| FRENA LEWIS, | : | |
| | : | |
| Defendant. | : | |

Submitted: March 18, 2015
Decided: June 29, 2015

**ORDER**

Upon Plaintiff's Motion for New Trial
*Denied.*

Benjamin A. Schwartz, Esquire and Robert C. Collins, II, Esquire of Schwartz & Schwartz, Dover, Delaware; attorneys for Plaintiff.

Jeffrey A. Young, Esquire of Young & McNelis, Dover, Delaware; attorney for Defendant.

WITHAM, R.J.

Before the Court is Jeffrey Shockley's ("Plaintiff") Motion for New Trial. At trial, the jury returned a verdict in favor of Frena Lewis ("Defendant"), finding that she did not proximately cause injury to the Plaintiff. Plaintiff now argues that no reasonable jury could have come to the conclusion that the Defendant was not negligent, but for comments made by Defense Counsel during his opening statement.

On a Motion for a New Trial pursuant to Superior Court Civil Rule 59, the Court presumes that the jury verdict is correct.[1] On a Motion for a New Trial, "[t]he Court will only set aside a verdict as insufficient if it is clear that the verdict was the result of passion, prejudice, partiality, corruption, or if it is clear that the jury disregarded the evidence or law."[2] Stated differently, a jury verdict will not be set aside unless it is against the great weight of the evidence, the verdict shocks the Court's conscience, or the Court is otherwise convinced that the jury "disregarded the applicable rules of law."[3] The Court "will not set aside a jury's verdict unless the evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result."

This case stems from an automobile accident that occurred on November 11, 2011, whereby Plaintiff was rear-ended and suffered injuries, including back pain. Plaintiff alleges that he sustained personal injuries from the car crash. This case was

---

[1] *Smith v. Lawson*, 2006 WL 258310, at *3 (Del. Super. Jan. 23, 2006) (citing *Mills v. Telenczak*, 345 A.2d 424, 426 (Del. Super. 1975)).

[2] *Littleton v. Ironside*, 2010 WL 8250830, at *1 (Del. Super. Oct. 6, 2010) (citation omitted).

[3] *Lawson*, 2006 WL 258310, at *4 (citations omitted).

tried initially from March 11-12, 2015. The trial resulted in the jury finding that Defendant was not negligent.

On February 17, 2015, the Plaintiff filed his Motion *in Limine* to exclude photographs of the Defendant's vehicle after the motor vehicle accident. The Court ruled that the photographs were inadmissible pursuant to *Davis v. Maute.*[4] The Court intended to exclude any photographs of the Defendant's vehicle because it felt that the jury would infer from the photographs, regardless of any limiting instruction given, that Plaintiff's injuries would correlate to the damage to the vehicle, which is explicitly prohibited by *Davis.*

The Defendant filed its Motion for Reargument on March 8, 2015, arguing that this Court misinterpreted *Davis* because it held that photographs that demonstrate the extent of damages to vehicles in an accident are inadmissible in the absence of an expert available to testify, granted, a narrow construction.

The Court failed to see how these photographs would *not* have an impact on the jury in the manner specifically prohibited by *Davis.* The Defendant would have had this Court allow the photographs in so the jury may make a determination of the Plaintiff's credibility at trial. However, the Court did not find this line of reasoning so probative as to outweigh the prejudicial effect the photos would have had on the jury. That is, that the Plaintiff's injuries correlated to the damage to the vehicle. The Court noted in the Order for the Motion for Reargument, that "The Defense is arguing, as its sole line of reasoning [...] that they are necessary for a jury to evaluate

[4] *Davis v. Maute*, 770 A.2d 36 (Del. 2001).

the Plaintiff's credibility. The Court finds this is not a proper purpose for admissibility per the reasoning in *Davis* and its progeny." Lastly, the Plaintiff's motion concerning the exclusion of photographs dealt solely with the issue of the pictures being introduced at trial. The motion did not in anyway touch upon any oral statements Counsel might make in front of the jury. The Court denied the Defendant's Motion for Reargument pursuant to Delaware Superior Court Civil Rule 59(e).[5]

Plaintiff's Motion for New Trial challenges the verdict based on Plaintiff's belief that the Defendant inappropriately suggested to the jury that a lack of damage to Plaintiff's vehicle inferred no injury to the Plaintiff, violating *Davis v. Maute.*[6] Plaintiff requests that this Court not only grant the motion, but also extend its Order on the Motion *in Limine* to exclude photographic evidence, to include a ban on mentioning the lack of damage to the Defendant's motor vehicle in any future trial.

The Plaintiff now comes before this Court arguing that Defense Counsel circumvented *Davis*, when his argument allegedly led the jury to infer that the Plaintiff did not suffer any injury. However, Plaintiff fails to give this Court any specific dialogue by Defense Counsel that is alleged to violate *Davis*, and the Court

[5] Del. Super. Ct. Civ. R. 59(e).

[6] 770 A.2d 36, 39 (Del. 2001).

is forced to hypothesize as to what statements Plaintiff's Counsel is referring.[7] Plaintiff believes after opening statements the Court should have declared a mistrial as opposed to admonishing the jury, because it was at that moment that the jury was improperly tainted. The Plaintiff takes issue with Defense Counsel because he "elicited from both plaintiff and defendant testimony concerning a lack of apparent damage to Ms. Lewis' vehicle."[8]

Plaintiff cites Defense Counsel's opening remarks as improper. Immediately thereafter Plaintiff's counsel requested this Court give either a curative instruction or grant a mistrial. The Trial Judge reminded Counsel that a preliminary instruction was already given to the jury, and gave a curative instruction to the Jury. The Jury was not to consider Plaintiff nor Defense Counsel's statements as evidence. Plaintiff's Counsel then suggested that the Defendant made reference to Plaintiff believing he had been hit by a motor vehicle traveling at fifty (50) miles per hour by a vehicle with little or no damage.

Defense Counsel's remarks, while perhaps zealous, did not cross the threshold of violating the Court's order regarding the photographs. Defense Counsel's remarks were a preview of the testimony that flowed from its witness. In fact, it was in Plaintiff's Motion *in Limine* that the speed limit of the vehicle is mentioned:

---

[7] Plaintiff's only direction for the Court as to specific dialogue at issue is that he believes some of this occurred during opening statements when Defense counsel "advised the jury that there was no damage to Defendant's vehicle." Therefore, the Court has reviewed the entire record.

[8] Pl. Motion, Page 3, note 9.

"[Plaintiff] stated in his discovery deposition that he believes [the Defendant] was traveling '40 to 50' miles per hour, easily."[9] The Plaintiff went on to state that his treating physician, Dr. Paul Ford, may have relied upon those statements to treat the Plaintiff.

Plaintiff's Counsel asked the Plaintiff "was this a fifty-mile-per-hour-collision?" thus eliciting the testimony himself. Plaintiff testified that he told Dr. Ford, his physician, he believed the vehicle was going at that speed. On cross examination, Plaintiff's Counsel elicited the same testimony from the Defendant, asking her whether she was traveling at fifty-miles-per-hour, and even asked her:

> Question: "And do you recall viewing the damage to the rear of Mr. Shockley's vehicle at that time?"
> Answer: Yes.
> Question: "And do you remember testifying that that's not the damage you saw after the collision still there at the scene?
> Answer: There was no damage"[10]

In sum, it was Plaintiff's Counsel who elicited testimony regarding the speed of Defendant's vehicle from three different witnesses. Aside from the fact that Plaintiff's Counsel elicited this topic of testimony, witnesses are allowed to discuss

[9] Pl. Motion *in Limine* at 4.

[10] Trial Transcript at 168.

opinions or inferences pursuant to Delaware Rule of Evidence 701.[11] Further, the Superior Court has previously held that lay witnesses may testify to the speed at which they perceive a vehicle to be traveling, as it does not require special skill, knowledge, or experience to do so.[12] To clarify, this is permissible only as an observation, but is not admissible if the lay witness is describing a vehicle's speed in order to correlate the damage to a vehicle.

Plaintiff's Counsel lastly contends that Defense Counsel's remarks violated *Davis* when he stated that there was "no damage" to the vehicle." *Davis* has been sliced and diced many times by the Courts in Delaware, and it is here that it will be dissected again. This case presented dramatically different points of view of the parties regarding the accident. The Plaintiff argued that his vehicle was involved in a serious accident, and that he was rear-ended by a vehicle traveling at a high rate of speed. Alternatively, the Defendant argued that there was barely any damage done to the car and that she was not driving at a high rate of speed.

---

[11] "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony of the determination of a fact in issue and (c) not based on scientific or other specialized knowledge within the scope of Rule 702."

[12] "Similar to approximating the speed at which a vehicle is traveling, and similar to the lay witnesses testimony in *Koutoufaris,* Ms. Hawkinson's testimony did not require special skill, knowledge, or experience and was thus a proper opinion [...]" *Norton v. Mulligan,* 2001 WL 1738871, at *4 (Del. Super. June 29, 2001) aff'd, 788 A.2d 131 (Del. 2001) *citing Dick v. Koutoufaris,* Del.Super., C.A. No. 88C-NO-114, Gebelein, J. (Jan. 30, 1991) (Mem.Op.).

Delaware Courts have previously ruled that *Davis* does **not** preclude the plaintiff "herself from describing what happened to her in the compartment of the vehicle upon impact." Even *Davis* held that "[o]f course, even where the sole issue at trial is damages, photographs of the plaintiff's car could conceivably serve some valid purpose other than supporting the minimal damage/minimal injury inference."[13] In the present case, Counsel mentioned there being "no damage" to a motor vehicle, however this testimony was brought out later by Defense and Plaintiff's Counsel, when the parties were describing what the scene looked like.

*Davis* addressed the sole issue of the attorney's damaging comments during opening statements, " ...the court's failure to provide a cautionary instruction after defense counsel's repeated characterization of the accident as a "fender-bender" constituted an abuse of discretion."[14] In the present case, this Court gave a curative instruction, per the Plaintiff's request. Under the purview of *Davis*, this curative instruction should have satisfied any potential for damage to the jury.

Even if there were a *Davis* violation, it was trivial. Plaintiff's Counsel went on to specifically ask if there was damage to the vehicle to more than one witness, as did Defense Counsel. It seems that if Plaintiff's Counsel believed these remarks to be so egregious, then he would not have parroted them in front of the jury, repeatedly.

---

[13] *Sloan v. Clemmons*, 2001 WL 1735087, at *6 (Del. Super. Dec. 17, 2001) *citing Davis*, 770 A.2d at 41.

[14] *Davis v. Maute*, 770 A.2d 36, 41 (Del. 2001).

The Court does not find that Defense Counsel's comment in argument had the alleged effect of resulting in a verdict that was against the great weight of the evidence. Lastly, it is worth noting that Plaintiff's Counsel did not move for a mistrial during trial, and instead stated "I wonder whether it is my obligation to move for a mistrial" without formally requesting such from the Court. Instead, Plaintiff's Counsel requested a curative instruction which the Court provided. For all these reasons, Plaintiff's Motion for New Trial is **DENIED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dsc
*Via File & ServeXpress*
oc: Prothonotary
cc: Counsel of record