

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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May 31, 2011

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**Re: *Hardy v. Adam McMillan Const., LLC, et al.*
*C.A. No. 09C-09-218 WCC***

Dear Counsel:

As you know, this personal injury case arising from a work-place fall at a construction site was tried to a jury from February 28 through March 3, 2011. After considering the evidence, the jury returned a verdict in favor of the plaintiffs and

awarded compensatory damages to Mr. Hardy in the amount of \$115,000 and to Mrs. Hardy for loss of consortium in the amount of \$10,000. Pending before the Court is the plaintiffs' motion for a new trial in which they argue that the jury's damages award was inadequate. For the reasons that follow, the motion for a new trial is **DENIED.**

I. Background Facts

Plaintiff, Grant Hardy, was injured on November 28, 2007, after he fell approximately 10 feet through an open stairwell in a home under construction at the Milltown Village development in Newark, Delaware. Mr. Hardy was delivering building materials to the home after hours at the time of the fall. Defendant, Adam McMillan Construction, LLC ("AMC"), was the framing contractor at the job site.¹ At trial, AMC acknowledged fault for failing to erect appropriate barriers around the open stairwell. ACM alleged, however, that Mr. Hardy was also negligent for entering the home after hours (in the dark) and for failing to keep a proper lookout for his own safety. The jury's verdict apportioned 80% fault to AMC and 20% to Mr. Hardy. Plaintiffs do not challenge this aspect of the jury's verdict. As stated, the

¹By Stipulation of all parties, including the plaintiffs, this case was consolidated with a case in which Mr. Hardy's worker's compensation carrier sought recovery of the worker's compensation benefits it had paid to Mr. Hardy from AMC and the general contractor, Benchmark Builders, Inc. By stipulation of all parties, including the plaintiffs, the cases were tried together before the same jury.

subject of their motion is the jury's award of damages.

Mr. Hardy's fall left him immobile in the basement level of the unfinished home after hours for a substantial period of time. Fortunately, a homeowner near by heard his calls for help and called for emergency assistance. He was taken by ambulance to the hospital where he remained for several days. He underwent trauma surgery during this initial hospitalization to stabilize his acute injuries, which included - - fractured skull and subdural hemotoma; fractured left orbital floor; fractured sternum; multiple fractured ribs; fractured spine at T-9; comminuted fracture of the distal radius; right complex triangular fibrocartilage complex ("TFCC") tear; fractured 5th metacarpal; and lacerated left ear. Of these injuries, the fractured distal radius and 5th metacarpal, the TFCC tear, and the left ear tear required later surgical repair (three procedures were required to address the hand and wrist injuries). He returned to the hospital on at least two additional occasions to address instability with his subdural hematoma and later to address a treatment-related impacted bowel.

According to his physician experts, Mr. Hardy sustained "mild to moderate" permanent injuries to his upper extremities (according to Dr. David Sowa), permanent vestibular disorder (dizziness) from his brain injury, and moderate permanent injury to his back (according to Dr. John Townsend, a consulting [not treating] physician).

This testimony was not contradicted by defense expert testimony.

At the time of trial, Mr. Hardy was not in the active care of any physician. He was taking over the counter pain medicine as needed. He was back to work full time earning the same salary he earned at the time of the accident. His physical activities at home and for recreation were certainly curtailed, but he did acknowledge that he still played the occasional round of golf and still played softball, albeit on a more restricted basis than before the fall. The jury heard no testimony regarding current or future medical expenses or current or future lost earning capacity. Plaintiffs “boarded” \$36,735.00 of recoverable special damages. The jury’s award to Mr. Hardy for general damages, therefore, was \$78,265.00 (\$115,000 - \$36,735.00).

As to Mrs. Hardy’s claim for loss of consortium, she testified that the evening of and days following her husband’s fall were very traumatic for her (and her family). She was not certain at first whether her husband would survive his injuries. Once these fears subsided, she was still confronted by the outward manifestations of her husband’s injuries - - cuts, bruises, swelling, i.v. and oxygen tubes, casts, etc. - - all of which were upsetting to her. In the months following the accident, Mrs. Hardy had to take on nearly all of the household duties. She also had to cope with her fear of the unknown - - would her husband recover, would he be able to work again, would they make it financially, etc.? She testified that her husband began to lose his temper

much more frequently and that this affected her and their marriage. And she testified regarding his ongoing disabilities which, she noted, have improved with time.

Plaintiffs have now moved for a new trial on the grounds that the jury's verdict ignores undisputed objective evidence of Mr. Hardy's injuries and otherwise is against the great weight of the evidence presented at trial. AMC has filed an opposition to the motion in which it contends that the jury's verdict reflects the undisputed evidence of Mr. Hardy's steady recovery and the jury's conclusion that the defendant's evidence and/or arguments regarding both proximate cause and damages carried the more persuasive force.

II. Standard of Review

When considering a motion for new trial under Rule 59,² the Court must appreciate that “[t]raditionally, the court’s power to grant a new trial has been exercised cautiously with extreme deference to the findings of the jury.”³ Further, “when the case involves a controverted issue of fact in which the evidence is conflicting and out of the conflict may be gathered sufficient evidence to support a verdict for either party, the issue of fact will be left severely to the jury....”⁴ The

²Super. Ct. Civ. R. 59.

³*Maier v. Santucci*, 697 A.2d 747, 749 (Del. Super. 1997)(citation omitted).

⁴*Storey v. Camper*, 401 A.2d 458, 462 (Del. 1979).

Court will not upset the verdict of a jury unless “the evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result.”⁵ Stated differently, “[a] jury’s award is presumed correct and just unless [it is] so grossly out of proportion to the [evidence presented] as to shock the Court’s conscience and sense of justice.”⁶

III. The Court Will Not Disturb the Jury’s Verdict

The Court’s conscience is not shocked by the jury’s verdict in this case. The evidence regarding Mr. Hardy’s injuries (extensive as they were) was not confusing.⁷ Based on this evidence, the jury could have concluded that Mr. Hardy was badly injured immediately following the fall but went on to experience a steady and remarkably good recovery. While it was not controverted that Mr. Hardy sustained permanent injuries, the extent to which these injuries have affected his day-to-day existence was disputed by AMC and was subject to interpretation by the jury. Indeed, weighing testimony regarding the extent and impact of personal injuries is within the

⁵*Id.* at 465.

⁶*Porter v. Murphy*, 2001 WL 1738872, at *1 (Del. Super.).

⁷ It is impossible to know whether the jury was “confused,” as plaintiffs suggest, by the presentation of the consolidated cases in a single trial. As an aside, the Court notes that the procedural posture of the case was exactly as all parties, including the plaintiffs, wanted it. More to this point, the plaintiffs have not offered any legitimate grounds upon which the Court could make further inquiry into the bases of the jury’s verdict (e.g. whether they were “confused” or not) and the Court is not permitted to speculate. *See* D.R.E. 606.

sole province of the jury.⁸ It is not for this Court to substitute its own view of the evidence (different as it may be) for that of the jury.⁹

In their motion, plaintiffs urge the Court to compare this verdict with verdicts returned in cases with similar facts in order to determine whether this verdict was adequate, or whether a new trial should be granted (based on decisions to grant new trials in other cases). The Court declines to engage in this exercise in recognition of the inherent flaw in this analytical approach: “It is inevitable that there will be dissimilar results in personal injury suits because no two juries will judge the effect of a plaintiff’s injuries identically.”¹⁰

For its part, AMC urges the Court to consider the reasonableness of the general damages award as a multiple of special damages. Here again, the Court declines to view the jury’s verdict through such a narrow lens. The Court’s jury instructions regarding damages say nothing of a specific correlation between general and special damages and there is no evidence to suggest that the jury, in fact, engaged in this

⁸*See Savage v. Cooke*, C.A. No. 94C-01-210, Quillen, J. (Del. Super. Oct. 27, 1995)(Letter Op.)(determinations made by the jury should not be disturbed even if the trial judge may have assessed the witnesses’ credibility differently).

⁹*See Caldwell v. White*, 2005 WL 1950902, *3 (Del. Super. May 25, 2005) (“Thus, [whether] *vel non* the Court would have reached a different verdict if the matter had been tried to the bench is of no moment and has no place in the Rule 59 analysis.”).

¹⁰*Bounds v. Delmarva Power & Light Co.*, 2004 WL 343982, at *8 (Del. Super. Jan. 29, 2004).

analysis in the jury room. Moreover, as plaintiffs correctly observe, if not for the consolidated trial, Mr. Hardy's special damages would have included the amount of the worker's compensation lien, in which case the special damages/general damages ratio reflected in the jury's verdict would have been significantly less.¹¹

Several factors may influence a jury's damages verdict beyond the nature of the injuries including, *inter alia*, the credibility and "likeability" of the parties, the extent to which the jury perceives that the plaintiff has coped with his injuries, pre and post accident lifestyle comparisons and, of course, the varying experiences and perceptions of the jurors themselves. Although it is impossible to know which, if any, of these factors animated the jury's deliberations and led to their verdict, the Court's function here is not to ascribe a motive or rationale for the verdict. Rather, the Court must simply determine if the jury returned a verdict which is contrary to the great weight of the evidence or if, by its verdict, the jury otherwise shocked the conscience of the Court. This jury did neither.

As this Court observed in *Dunkle v. Prettyman*:¹²

While certainly not dispositive of the issue, the strict standard of review

¹¹Without the worker's compensation lien, the jury's total verdict was approximately three times the amount of special damages (special damages \$36,735.00; total verdict \$115,000). The worker's compensation lien, awarded in full by the jury (less 12.5% comparative negligence), was \$79,337.13.

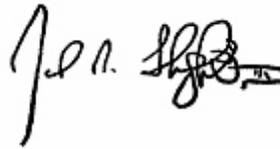
¹² 2002 WL 833375, at **2-3 (Del. Super.).

by which a motion for new trial is measured no doubt recognizes that it is the parties themselves who elect to present their claims to a jury of their peers and, by so doing, it is the parties who activate the machinery which is our jury trial system. When the parties activate the jury trial system, they activate the risk inherent in the system. And, of course, trials by jury implicate the most risky element of dispute resolution - uncertainty.

“[T]hose of us involved in the judicial system cannot [and should not] make litigation risk-free.”¹³ Plaintiff’s motion for new trial is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink, appearing to read "J.R. Slights, III". The signature is written in a cursive, somewhat stylized font.

Joseph R. Slights, III

¹³*Savage, supra*, Letter Op. at 3.