IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

ANTONIEL RODAS,	:	
Plaintiff,	:	C.A. No. S10C-04-028 WLW
v.	:	
DAWN L. DAVIS and GLASCO TRANSPORTATION, INC.,	:	
Defendants.	:	
	:	
AND	:	
	:	
ROSIE L. COLEMAN and JAMES COLEMAN,	:	
Plaintiffs,	:	
v.	:	
DAWN L. DAVIS and GLASCO TRANSPORTATION, INC.,	:	
Defendants.	:	

Submitted: October 28, 2011
Decided: January 31, 2012

ORDER

Upon Defendants' Motion for Remittitur, or
in the Alternative, for a New Trial.
Remittitur Granted.
Upon Plaintiff's Motion for Prejudgment Interest and Costs.
Granted.

Michael A. Pedicone, Esquire of Schuster Jachetti, LLP, Wilmington, Delaware, attorney for the Plaintiff Antoniel Rodas.

Brian T. McNelis, Esquire of Young & McNelis, Dover, Delaware; attorney for the Defendants.

WITHAM, R.J.

FACTS

This case arose out of a motor vehicle collision on May 2, 2008 on South Bedford Street in Georgetown, Delaware. A school bus owned by Glasco Transportation, Inc. and driven by employee Dawn L. Davis was unable to stop. She struck the rear of an automobile driven by Antonio Rodas (hereinafter "Rodas"). Due to the impact from the rear, Rodas' vehicle moved forward, striking a second vehicle driven by Rosie L. Coleman. Cases brought by Coleman and Rodas were consolidated. A three day jury trial commenced on September 19, 2011 and culminated in verdicts for both Rodas and Coleman. The Coleman judgment was fully satisfied. The Rodas judgment is at issue here. The jury awarded him a verdict in the amount of $410,000. Defendants now move for remittitur, or in the alternative, for a new trial. Rodas moves for prejudgment interest and costs.

Standard of Review

Superior Court Civil Rule 59(a) states, in pertinent part, "A new trial may be granted as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court." A motion for a new trial serves a different purpose than judgment as a matter of law, and it has a separate standard.[1] In deciding such a motion, the Court must weigh the evidence to decide if the verdict

[1] *Id.* at *5.

was one which might have been reached on reasonable grounds.[2] In analyzing a motion for a new trial, there is a presumption that the jury verdict is correct.[3] In order to be set aside, the jury's verdict must be "against the great weight of the evidence or the verdict shocks the Court's conscience."[4] Stated in a different manner, the jury's verdict may be disregarded when the Court is of the belief that the jury ignored the applicable rules of law.[5] Fifty years ago, this Court stated,

> [T]he verdict must be manifestly and palpably against the weight of the evidence or for some reason, or a combination of reasons, justice would miscarry if it were allowed to stand. It is not a sufficient ground for a new trial that the verdict is merely against the preponderance of the testimony, or that the Court may have arrived at a different result.[6]

DISCUSSION

Defendants urge the Court to issue an order for remittitur, or in the alternative an order for a new trial. In support of their argument, Defendants take issue with the scope of Dr. DuShuttle's expert testimony, the reference in Rodas' post-motor vehicle accident records to diagnoses of anxiety and stress from a second motor vehicle accident in February 2010, the "emotional outburst" of Rodas at trial, and Rodas'

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[2]*McCloskey v. McKelvey*, 174 A.2d 691, 693 (Del. Super. 1961).

[3]*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)).

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

[5]*Id.* (*citing Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973)).

[6]*McCloskey*, 174 A.2d at 693.

testimony regarding his financial support of several relatives in Guatemala.

Rodas utilized Dr. DuShuttle as his sole medical expert to testify as to the causal connection between the accident and his injuries.[7] Specifically, Defendants state that the Court erred as a matter of law in allowing a board-certified orthopedic surgeon to testify regarding all of Rodas' post-accident injuries and treatment. They aver, "Plaintiff's counsel asked Dr. DuShuttle to provide a medical opinion to the jury that Plaintiff's neurology, psychiatric and ophthalmology care and medical bills were reasonable, necessary, and related to the June 2, 2008 motor vehicle accident."[8] Defendants challenge the scope of what Dr. DuShuttle may testify to based on his expertise and thereby the relevance and reliability of his testimony regarding the reasonableness, necessity, and relatedness of Rodas' treatment for a concussion, post-traumatic headaches, sleep difficulty, and night terrors.

The Delaware Supreme Court has adopted a five-part test to determine the admissibility of expert or scientific testimony which requires the trial judge to decide whether:

> (1) The witness is qualified as an expert by knowledge, skill, experience, training or education; (2) The evidence is relevant and reliable; (3) The expert's opinion is based upon information reasonably relied upon by experts in a particular field; (4) The expert testimony will assist the trier

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[7] *Rayfield v. Power*, 840 A.2d 642, 2003 WL 22873037, at *1 (Del. 2003) (TABLE) (*citing Money v. Manville*, 596 A.2d 1372, 1376-77 (Del. 1991) ("With a claim for bodily injuries, the causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injury must be proven by the direct testimony of a competent medical expert.").

[8] Mot. at 5.

> of fact to understand the evidence or to determine a fact in issue; and (5) The expert testimony will not create unfair prejudice or confuse or mislead the jury.[9]

Further, "[e]ven though an expert may be qualified to opine within a recognized 'field,' that fact alone does not automatically guarantee reliable, and therefore admissible, testimony. It is critical that a trial judge be satisfied that any generalized conclusions are applicable to the particular facts of the case."[10]

After a full review of Dr. DuShuttle's testimony, this Court finds as follows. Dr. DuShuttle is a medical doctor with over 27 years of experience who is board-certified in orthopedics – the field of medicine that deals with the musculoskeletal system. He had experience with Rodas and his medical records. Although Defendants are correct that he does not have specialties in neurology, psychiatry, or ophthalmology, the Court is satisfied that his 27 years of experience in treating patients who have had similar complaints, along with his general background in medicine,[11] allow Dr. DuShuttle to provide relevant and reliable evidence regarding the reasonableness, necessity, and relatedness of treatment for a concussion, post-traumatic headaches, sleep difficulty, and night terrors to Rodas' automobile accident. The Court notes that Defendants did not procure their own medical expert and did not

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[9]*Eskin v. Cardin*, 842 A.2d 1222 (Del. 2004) (*citing Cunningham v. McDonald*, 689 A.2d 1190, 1193 (Del. 1997)).

[10]*Goodridge v. Hyster Co.*, 845 A.2d 498, 503 (Del. 2004).

[11]*See* Dep. at 4-5; 14.

cross-examine Dr. DuShuttle on the disputed medical treatments. Neither of these actions are required to raise such an objection, but Defendants' failure to take either action makes an implicit statement on the credibility of the objection. With all of the above stated, the Court firmly believes that allowing the testimony of Dr. DuShuttle was in full compliance with D.R.E. 702, *Eskin*, and *Goodridge.*

The Court acknowledges reference to stress and anxiety caused by Rodas' second motor vehicle accident in February, 2010 in the medical records. The Court believes that inclusion of these records is harmless error. The date of the medical records is clearly stated in the document, and the record is clearly related to the second accident. The Court firmly believes that if the jury consulted the records at all, the jury members were of sufficient intelligence to have distinguished the first accident, and the injuries and treatment associated with it, from the second accident. As such, the reference in the medical records was harmless error.

With regard to emotional testimony of Rodas, the Court believes that it played a significant role in what was an excessive verdict for Rodas. Rodas became very upset while on the witness stand, and he discussed his financial support of relatives in Guatemala. In order to be set aside, the jury's verdict must be "against the great weight of the evidence or the verdict shocks the Court's conscience."[12] The evidence clearly supported liability for Defendants. Dr. DuShuttle testified that the May 2, 2008 accident caused a lumber and cervical strain, a herniated lower back disk, and

[12]*Smith v. Lawson*, 2006 WL 258310, at *3 (*citing Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979)).

an aggravation of a preexisting degenerative condition in the neck.[13] He stated that Rodas' herniation would cause periodic problems indefinitely.[14] His testimony also supported a total of $28,698.43 in past medical bills.[15] The Court finds, however, that the jury did not fulfill its charge of rendering a verdict while remaining disengaged from personal sympathies for Rodas.[16] As such, the case is ripe for a new trial. The Defendants, however, have asked for a new trial in the alternative.

The jury verdict of $410,000 for mild to moderate injuries with a periodic, permanent back injury from a car accident shocks the conscience of the Court and certainly allows for remittitur.[17] When deciding a motion for remittitur, the Court "must evaluate the evidence and decide whether the jury award falls within a supportable range. In doing so, the court still defers to the jury and reduces the jury's award to the absolute maximum amount that the record can support (in the case of remittitur) . . . ."[18] The jury verdict of $410,000 falls outside the supportable range. The absolute maximum award that may be supported by the evidence in this case is $205,000.

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[13]Dep. at 15.

[14]*Id.* at 16.

[15]*Id.* at 16-17.

[16]Pleas for sympathy, whether intended or not, are to be prevented and discouraged as it affects a rational view of the evidence.

[17]*See Kocher v. Capodanno*, 1990 WL 127823, at *2 (Del. Super. Aug. 31, 1990).

[18]*Murphy v. Thomas*, 801 A.2d 11, 2002 WL 1316242, at *1 (Del. 2002) (TABLE).

Rodas moved for prejudgment interest and costs. As costs and fees are not disputed by Defendants, they are hereby awarded. Rodas' application for prejudgment interest is pursuant to 6 *Del. C.* § 2301(d) which states:

> In any tort action for compensatory damages in the Superior Court or the Court of Common Pleas seeking monetary relief for bodily injuries, death or property damage, interest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing from the date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered.

As the verdict has been reduced to an amount below the first alleged demand letter, the Court finds it unnecessary to comment on the dispute relative to that letter since it no longer qualifies under the statute. As to the second letter sent shortly after mediation, dated July 22, 2011, Plaintiff contends that the letter complies with the statute and is thereby a valid demand letter. Defendants contend that the letter represents ongoing settlement negotiations between the parties following the unsuccessful mediation. Defendants note further that the letter represents a past verbal demand and not the written one that 6 *Del. C.* § 2301(d) requires.

6 *Del. C.* § 2301(d) has three requirements: (1) a demand made by a plaintiff to a defendant to settle a lawsuit; (2) the demand, in fact, remains open for 30 days; and (3) the jury must award plaintiff more than the demand.[19] The situation at hand goes to what constitutes a "demand," or just how loose a writing may be while still

[19]*Drayton v. Price*, 2010 WL 1544414, at *9 (Del. Super. Apr. 19, 2010).

being considered a demand. Upon reading the letter in full, although it does not provide the formality of a typical demand letter, it informs defendants of an amount in writing that would settle the case. The offer remained open for at least 30 days, and the final verdict of $205,000 is more than the amount. Therefore, Rodas fulfilled the statutory requirements and is entitled to prejudgment interest pursuant to 6 *Del. C.* § 2301(d). The rate is calculated pursuant to 6 *Del. C.* § 2301(a), which establishes the legal rate of interest as 5 percent over the Federal Reserve discount rate. Rodas submits that at the time of the accident the Federal Reserve discount rate was 2 percent, which would make the legal rate 7 percent. The period of time between the accident on May 2, 2008 and the original verdict on September 21, 2011 is 3 years and 142 days. The prejudgment interest equals $48,632.74.

CONCLUSION

The Court concludes that there was no substantial legal error but that the jury's verdict was excessive. Therefore, upon remittitur, the Court reduces Plaintiff's recovery to $205,000, plus prejudgment interest of $48, 632.74, plus costs and fees of $2,396.50, for a final total of $256,029.24.

IT IS SO ORDERED.

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

WLW/dmh