

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

JUDY PHILLIPS, :
 : C.A. No. 02C-06-029 WLW
Plaintiff, :
 :
v. :
 :
JOHN H. LOPER, :
 :
Defendant. :

Submitted: October 18, 2004
Decided: January 27, 2005

ORDER

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

Kenneth J. Young, Esquire of Young Malmberg & Howard, P.A., Dover, Delaware; attorneys for the Plaintiff.

Jeffrey A. Young, Esquire of Young & Young, P.A., Dover, Delaware; attorneys for the Defendant.

WITHAM, R.J.

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Upon consideration of Plaintiff's Motion for a New Trial pursuant to Superior Court Civil Rule 59, it appears to the Court that:

Judy Phillips ("Plaintiff") commenced this action against John H. Loper ("Defendant") as a result of alleged injuries sustained in a multiple vehicle collision that occurred on July 2, 2000. Although liability for the collision was not disputed, proximate cause and damages remained viable issues for trial. A jury trial was conducted and the jury ultimately returned a defense verdict finding that the collision was not the proximate cause of Plaintiff's injuries.

Plaintiff has filed a motion for a new trial contending that the jury was presented with uncontradicted and unrebutted expert medical testimony establishing that the vehicle collision was the proximate cause of the injuries sustained by Plaintiff. Plaintiff, relying upon the decision in *Amalfitano v. Baker*,¹ contends that a new trial is required because no reasonable jury could have returned a verdict of zero damages based upon the evidence presented. Defendant contends that Plaintiff's assertion is erroneous and her reliance upon *Amalfitano* is misguided. Defendant argues that ample evidence existed for the jury to question Plaintiff's credibility and the conclusions by Dr. Rowe which were derived substantially from Plaintiff's assertions. Because a reasonable jury could have discredited the conclusions of Dr. Rowe, Defendant contends that it would be inappropriate to disturb the jury's verdict of zero damages.

¹ 794 A.2d 575 (Del. 2001).

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Jury verdicts are given enormous deference by the courts and will not be disturbed unless the verdict is against the great weight of the evidence such that a reasonable jury could not have reached the same conclusion.² The validity of awards for damages by the jury are similarly presumed correct and will not be disturbed absent exceptional circumstances.³ A motion for a new trial will not be granted so long as there is a sufficient evidentiary basis supporting the jury's award for damages.⁴ The issue before this Court is whether a reasonable jury could have returned a verdict of zero damages based upon the evidence presented.

Plaintiff contends that the evidence presented to the jury, starting with the testimony of Trooper J.A. Lane, conclusively establishes that Plaintiff has suffered some injury as a result of the collision and a verdict of zero damages is therefore against the great weight of the evidence as a matter of law. Trooper Lane testified that Plaintiff complained of personal injuries at the scene of the collision. Plaintiff was transported directly from the scene of the accident to the hospital where she complained of headaches as well as pain in her neck and shoulder area. The attending physician diagnosed Plaintiff with an acute cervical strain. Plaintiff was prescribed Darvocet for her pain and was discharged with instructions to apply ice

² *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997) (citing *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979)).

³ *Id.* at 1236.

⁴ *Id.* at 1237.

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and asper creme to her sore areas.

The morning following the accident Plaintiff began experiencing lower back pain and stiffness. On July 10, 2000, eight days after the accident, Plaintiff visited Dr. Sandeep Mann, her family physician. Dr. Mann diagnosed Plaintiff with a back sprain and referred her for X-rays and physical therapy.⁵ After attending physical therapy for approximately nine weeks for her back pains, Plaintiff scheduled an appointment to meet with Dr. Rowe, an orthopedic surgeon.⁶ When she met with Dr. Rowe on October 12, 2000, Plaintiff primarily complained about her left shoulder. An examination conducted by Dr. Rowe revealed left trapezial tenderness, left supraspinatus tenderness, and weakness bilaterally in the subscapularis. Plaintiff underwent an MRI that displayed advanced supraspinatus tendon apathy with a probable small partial undersurface tear, and marked subacromial bursitis and hypertrophy of the left shoulder acromion. Plaintiff subsequently went to physical therapy from December 27, 2000 through February 1, 2001.⁷ Upon conclusion of physical therapy, Plaintiff's shoulder remained unimproved and Plaintiff's only available option was surgery. Plaintiff opted to

⁵ Dr. Mann's examination indicated that Plaintiff had tenderness on palpitation of C3-C4 spinus process, tenderness on palpation of the left trapezius muscle, pain and tenderness of the L1 through L5 spinus process, and tenderness of the left paravertebral muscles.

⁶ Plaintiff received therapy three times a week from July 28, 2000 to October 2, 2000.

⁷ Plaintiff also had other treatments during this period such as injections and medications which produced mixed results.

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forego surgery.

Plaintiff contends that the medical evidence presented in this case was un rebutted and uncontradicted. Specifically, Dr. Rowe testified that Plaintiff's injuries were proximately caused by the automobile collision. Dr. Rowe stated that his opinion was based upon the actual treatment he provided to Plaintiff along with his review of Plaintiff's prior medical records. Dr. Rowe further opined that the treatments provided by Kent County Hospital, Dr. Mann, and Barker Therapy and Rehabilitation were reasonable and necessary due to the injuries sustained by the Plaintiff in the accident. Because the evidence presented was un rebutted and uncontradicted, Plaintiff contends that no reasonable jury could have concluded that the collision was not the proximate cause of Plaintiff's injuries. Plaintiff contends that this factual scenario closely resembles the scenario in *Amalfitano*.

Defendant contends that Plaintiff's motion for a new trial should be treated as a motion for reargument because this Court has already ruled on the viability of a potential defense verdict during the course of the Prayer Conference and jury instructions finding that sufficient evidence existed to challenge the credibility of the Plaintiff and the conclusions by Dr. Rowe.⁸ Although Defendant did not produce their own expert to rebut Dr. Rowe's conclusions, Defendant contends that the

⁸ While this Court recognizes that the potential for a defense verdict was already discussed during the trial, this motion is nonetheless analyzed as a motion for a new trial pursuant to Rule 50(b) which provides "Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion...."

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expert' s testimony was adequately contested through effective cross-examination. Defendant also claims that Plaintiff' s credibility was severely exposed during the trial. Because Plaintiff' s credibility was severely exposed and because Dr. Rowe' s conclusions concerning proximate cause were substantially based upon Plaintiff' s assertions, Defendant contends that a sufficient evidentiary basis exists to support a verdict of zero damages. In addition, Defendant asserts that Plaintiff' s reliance upon *Amalfitano* is unpersuasive because *Amalfitano* involved subjective complaints confirmed by objective testing whereas the case *sub judice* lacks independent objective testing confirming Plaintiff' s complaints. Accordingly, Defendant contends that no legal basis exists to grant Plaintiff' s motion for a new trial.

Delaware law is clear where liability is undisputed and the jury returns a verdict of zero damages. A verdict of zero damages is against the great weight of the evidence when there is uncontradicted and unrebutted evidence that an injury has occurred as a proximate result of the alleged incident.⁹ Expert medical testimony may constitute such evidence if such testimony is based upon the subjective complaints of the alleged victim confirmed by independent objective testing.¹⁰ Absent unusual circumstances, such expert medical testimony should be deemed conclusive if “ it is unrebutted when presented by one side and left uncontradicted

⁹ See *Amalfitano*, 794 A.2d at 576.

¹⁰ *Id.* at 577.

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by the other party.”¹¹ However, a jury may reject an expert’s medical testimony when such testimony is based substantially upon the subjective complaints of the patient.¹²

There is no dispute Plaintiff subjectively attributes her injuries to the collision. The issue before this Court is whether those subjective complaints are confirmed by independent objective tests thus necessitating an award for damages as a matter of law. The majority of Dr. Rowe’s expert medical testimony only concerned the injury to Plaintiff’s left shoulder. Dr. Rowe stated when he first saw Plaintiff on October 12, 2000, three months after the accident, Plaintiff proclaimed that her shoulder was injured as a result of the collision that occurred on July 2, 2000. As a result of Plaintiff’s assertion, Dr. Rowe opined that the collision was the proximate cause of Plaintiff’s shoulder injury. Specifically, Dr. Rowe’s deposition reads:

A. Based upon her history, she told me she hasn’t had any problems leading up to the accident and had immediate pain at the time of the accident. So I certainly felt this was all related to the car accident.

Q. And was that opinion bolstered or strengthened by the records that you subsequently reviewed showing her previous treatment.

¹¹ *Id.* at 578.

¹² *Walker v. Campanelli*, 2004 Del. LEXIS 462, at *8.

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A. Yes, they have.¹³

Dr. Rowe further opined:

Q. What, in your opinion, were the injuries that Ms. Phillips sustained in the July 2, 2000 auto accident?

A. I believe that she sustained an injury to her shoulder, her left shoulder. She developed significant rotator cuff tendinitis and bursitis, and she also had a low back strain.¹⁴

Dr. Rowe's conclusion with respect to proximate cause was based upon the lack of medical treatment in the immediate time period prior to the accident, the medical records after the accident that memorialized Plaintiff's subjective complaints and discomforts, and Plaintiff's initial declaration that her shoulder injury occurred as a result of the accident. On cross-examination, however, Defense Counsel effectively accentuated that Dr. Rowe's conclusions were principally based upon his reliance on Plaintiff's contentions.

Q. Okay. And is it fair to say that particularly where you have soft tissue injuries, you are relying on the accuracy of your patient so you can diagnose things properly and assess things properly.

A. It is helpful, yes.

Q. Well, it is more than helpful, isn't it? It is almost essential. I mean

¹³ Dr. Rowe's Dep. at 22.

¹⁴ Dr. Rowe's Dep. at 40.

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if the patient isn't being forthright with you, you are going to have some major difficulty assessing things.

A. It depends on the injuries. I mean some patients are unconscious, and you still have to make a diagnosis.

Q. Sure. This wasn't one of those cases.

A. That is correct.

Q. This is a case where you are measuring pain and range of motion, where you are relying very heavily on the patient.

A. That is why it is helpful.¹⁵

Because Dr. Rowe's conclusions rely significantly upon the truthfulness of statements made by the Plaintiff, the reliability of Dr. Rowe's conclusions hinges upon the credibility of the Plaintiff.

The jury had ample reason to discredit Plaintiff. Most notably was the performance of Plaintiff at trial. Plaintiff's position at trial was that she was incapable of lifting her elbow past her shoulder. However, with the jury present and observing, Plaintiff extended her arm beyond the limited range of motion she had claimed to have suffered. Without more the jury would have a sufficient basis to disbelieve the Plaintiff. Nonetheless, Dr. Rowe's deposition also discusses Plaintiff's answers to certain questions on his intake form which reveal other reasons a jury may have discredited the Plaintiff.

¹⁵ Dr. Rowe's Dep. at 57.

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Q. Question 17 on your intake form asks specifically if the patient has been involved in prior accidents. It looks like Ms. Phillips left that blank. Am I missing anything?

Q.

A.

B. You are right. On question 17, it was left blank.

Q. That question is there for a reason, I take it. I mean you want to know the patient's history, correct?

A. Yes.

Q. And the fact of the matter is that Ms. Phillips had been in prior accidents and had previous injuries, at least to her low back, as well as right shoulder, correct?

A. Well, I had taken care of her for her – for the accident that she was injured in for the low back. The right shoulder was not related to the accident.

Q.

A.

Q. – you asked about the accident in particular. Subparagraph F of the same question says: Were you unconscious at any time during the accident? And she wrote yes. Is that correct?

A. Yes.

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Q. You see in the hospital record, as well— and you testified about it earlier, Doctor — and you would agree that record specifically says she denies any loss of consciousness. Have you seen that?

A. Yes, I have.

Q. Okay. So at least that is certainly inconsistent with the hospital record, what she is indicating there? You would agree?

A. Yes, I don' t know if she is confused about the question or what, but it is inconsistent.¹⁶

The jury may have discredited the Plaintiff based upon these answers she provided to Dr. Rowe which were less than forthright. In short, the jury had ample reason to discredit the Plaintiff. Because Dr. Rowe' s conclusions were substantially based upon Plaintiff' s contentions, the jury similarly had sufficient reason to discount his conclusions.

Dr. Rowe also acknowledges in his deposition that Plaintiff' s shoulder injury could have occurred from another source.

Q. Okay. And is this a condition which normally comes from trauma, meaning some injury, or one that comes over time?

A. That is a tough question. Bursitis can happen where someone can say: I don' t remember what happened. I don' t remember what caused it. I don' t recall doing anything in particular. You know, rotator cuff

¹⁶ Dr. Rowe's Dep. at 54-57.

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tendinitis generally happens with some overuse to the rotator cuff. You know, it is either overuse over a period of time or it may have been somebody where you just did too much on one day, or it could be an acute traumatic event. It pretty much has a spectrum.

Q. Now, hers, as she related to you, started with the motor vehicle accident—

A. That' s correct.

Q. — of July 2, 2000. Do you have an opinion as to what the cause of her problem was?

A. I believe it started with the motor vehicle accident.¹⁷

Although Dr. Rowe believed the motor vehicle accident was the proximate cause of Plaintiff' s shoulder injury, it is clear that this opinion was based upon his reliance of Plaintiff' s statements and that there could have been alternate catalysts for her shoulder injury. Dr. Rowe' s deposition further discloses that Plaintiff did not persistently complain about her shoulder injury until three months after the accident.¹⁸

Q. And would you agree that the second visit with Dr. Mann, which is July 17, 2000, that record specifically says that Ms. Phillips claims she

¹⁷ Dr. Rowe' s Dep. at 27-28.

¹⁸ Notwithstanding the fact that Plaintiff did initially complain of shoulder pain following the accident.

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is having back pain. And then three lines, three handwritten lines down from that, it specifically says no other complaints. Is that how you would read that, as well?

A. That is how I see it, yes.

Q. Okay. So there is nothing here about neck, or, for that matter, shoulder; would you agree?

A. That is correct.

Q. And the physical therapy that Dr. Mann sent Ms. Phillips to was strictly for the low back, correct?

A. Yes, that's correct.

Q. And you have reviewed those physical therapy records. And for at least two months of that therapy, beginning in July, the only treatment is to the low back?

A. Yes.

Q. So there are neither complaints nor treatments for certainly not the neck nor even the left shoulder, correct?

A. Yes, that's correct.

Q. Meanwhile, she is working as a beautician, as well as a custodian; is that your understanding?

A. Yes.¹⁹

¹⁹ Dr. Rowe's Dep. at 51-52.

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In sum, there was ample evidence for the jury to conclude that the accident was not the proximate cause of Plaintiff's shoulder injury. Although Defendant did not produce an expert to rebut Dr. Rowe's opinion on the issue of proximate cause, such medical testimony did not conclusively establish a causal link between the injury and the automobile accident. Dr. Rowe conceded that there are many ways this injury could have occurred and that his opinion on causation was substantially based upon Plaintiff's contentions. Given the disparity in time between the date of the collision and the date Plaintiff first visited Dr. Rowe coupled with the credibility issues encompassing Plaintiff, the jury had ample reason to conclude that the shoulder injury was not a proximate result of the collision. Thus, this Court cannot conclude that such a finding is against the great weight of the evidence.

The remaining issue is whether uncontradicted medical testimony exists linking Plaintiff's remaining injuries to the accident. The evidence does suggest that Plaintiff has suffered at least some injury as a result of the accident. In particular, Plaintiff went to the hospital immediately following the accident and subsequently underwent physical therapy as a result of these alleged injuries. Although Dr. Rowe's deposition primarily focused upon the shoulder injury, Dr. Rowe did opine that these additional injuries were the proximate result of the car accident. Considering the timing of events, the medical records presented by Plaintiff, and Dr. Rowe's opinion establishing the causal link between the accident and the injuries, it would be reasonable for a jury to conclude that the Plaintiff has sustained some injury as a result of the collision. A reasonable jury, however, could

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also conclude that no compensable injury resulted from the collision. With respect to these remaining injuries, there simply were no independent objective tests confirming Plaintiff's subjective complaints. Although examinations revealed tenderness and Plaintiff was diagnosed with an acute cervical sprain, such determinations were substantially based upon Plaintiff's subjective complaints and cannot be classified as independent objective testing.

Plaintiff has requested a new trial contending that no reasonable jury could have returned a verdict of zero damages based upon the evidence presented. However, the majority of evidence presented derived from Plaintiff's subjective complaints. Because the jury was presented with ample legitimate reasons to discredit Plaintiff, the jury similarly had a sufficient basis to discredit Dr. Rowe's opinion on the issue of proximate cause. Although a reasonable jury could have inferred that the collision may have caused at least some injury, there is no evidence conclusively confirming such injuries or linking such injuries to the collision. Moreover, the Supreme Court has warned parties that the law "does not compensate for every loss and the jury serves as the conscience of the community, sending a message to exaggerating and overly litigious claimants."²⁰ Considering Plaintiff's credibility issues surrounding her shoulder injury coupled by the lack of independent objective testing confirming her remaining injuries, this Court can not conclude that the jury verdict is against the great weight of the evidence or that Plaintiff is entitled

²⁰ *Walker*, 2004 Del. LEXIS 462, at *7.

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to a new trial as a matter of law. Accordingly, Plaintiff' s motion for a new trial is hereby *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File