



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREW P. RASH and :
APRIL RASH, :
 : No.: 214,2016
 :
 : Plaintiffs Below, Appellants, :
 :
 : V. : Court Below Superior Court
 : of Delaware New Castle County
 :
 : JUSTIN C. MOCZULSKI and :
 : DIAMOND MATERIALS, LLC, : C. A. No. N13C-06-068 VLM
 :
 : Defendants Below, Appellees. :
 :

PLAINTIFFS BELOW, APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

Andrew and April Rash, Plaintiffs Below, Appellants, do hereby appeal to the Supreme Court of the State of Delaware from the opinion of the Superior Court by the Honorable Charles E. Butler, dated April 25, 2016, denying a new trial and granting an additur totaling \$10,000.¹ The Appellees are Justin C. Moczulski and Diamond Materials, LLC (hereafter “Defendants”).

On June 8, 2013, Plaintiffs filed a Complaint against Defendants regarding a motor vehicle accident that had occurred on September 22, 2014. The complaint alleged that Defendant Moczulski was negligent for causing the September 22, 2014 motor vehicle accident and that the negligence of Defendant Moczulski was imputed on to Defendant Diamond Materials as the former was operating the vehicle as an agent or servant of the latter. Mediation was held on June 15, 2015; however, the parties were unable to settle the case and proceeded to trial.

On September 14, 2015, a jury trial began on Plaintiffs’ claim against Defendants. At the conclusion of the two-day trial, the jury deliberated and returned a verdict answering “Yes” when asked “Do you find that the plaintiffs sustained one or more injuries proximately caused by Defendant Moczulski’s negligence?”² However, the jury awarded zero dollars in damages to Plaintiffs.

¹ *Rash v. Moczulski*, C.A. No. N13C-06-068 VLM, J. Butler (Del. Super. Ct. Oct.28, 2015) (Opinion) is attached as Exhibit A.

² Completed Jury Verdict Form is attached hereto as Exhibit B. Plaintiffs’ counsel sought to have this question removed from the verdict form and instead, ask only what amount of damages

Plaintiffs filed a Motion for New Trial on September 29, 2015. On October 12, 2015, Defendants filed Defendants' Request for Additional Time within which to Obtain a Copy of the Trial Record or, Alternatively, Defendants Response to Plaintiffs' Motion for New Trial. Defendants filed a formal Response to Plaintiffs' Motion for New Trial on December 14, 2016. Upon receipt of the trial transcript, Plaintiffs filed an Amended Motion for New Trial on December 21, 2015, which Defendant acknowledged adoption thereof on January 5, 2016.

On April 25, 2016, the Superior Court rendered a decision denying Plaintiffs' Motion for a New Trial and granting Additur. The Superior Court awarded \$8,000 to cover the cost of a medical device and \$2,000 for additional related office visits, for a total of \$10,000.

Claimant filed Notice of Appeal with the Supreme Court of the State of Delaware on April 28, 2016. This is Plaintiffs' Opening Brief on appeal of the Superior Court's April 2, 2016 Opinion.

the jury found each Plaintiff was entitled to. However, the judge decided to submit the question so as to allow the jury to find causation before getting to damages. (A-293-95)

SUMMARY OF ARGUMENT

- I. THE TRIAL COURT'S DECISION DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL PURSUANT TO SUPERIOR COURT RULE 59 WAS AN ABUSE OF DISCRETION AND THEREFORE PLAINTIFFS ARE ENTITLED TO A NEW TRIAL

- II. THE TRIAL COURT'S AWARD OF \$10,000 FOR ADDITUR WAS UNREASONABLE
 1. The Trial Court's award of additur was unreasonable as it failed to award any compensation for Male Plaintiff's pain and suffering despite a finding that Male Plaintiff was injured as a proximate cause of the accident.
 2. The Trial Court's award of additur was unreasonable as it failed to grant reasonable compensation for future medical care.

STATEMENT OF FACTS

This case arises from a motor vehicle accident that occurred on Thursday, September 22, 2011, on US 13 in Dover, Kent County, Delaware. On the aforementioned date, Male Plaintiff was travelling southbound when he came to a stop for a school bus. (A-69-70). While stopped, Male Plaintiff was struck from behind by a vehicle driven by Defendant Moczulski and owned by Defendant Diamond Materials, LLC. (A-70). The impact was forceful enough to blow out the windows of the car, push the Male Plaintiff's vehicle approximately 75-150 feet down the road and rotate the vehicle. (A-70-71; A-13 at 12:12-21). Male Plaintiff recalls clenching his jaw in response to the forcefulness of the impact (A-70).

The morning after the impact, Male Plaintiff reported experiencing prominent ringing in his ear, or a sensation known as tinnitus. (A-73). He described the tinnitus as a constant, screechy kind of ringing occurring predominating on the right side of his head. (A-75). He had never had prior problems or complaints of tinnitus prior to the accident. (A-78). He also woke up with an onset of headaches. (A-73). While Male Plaintiff recognized that he had experienced headaches in the past, he testified that the post-accident headaches were different in nature. (A-76). The headaches he experienced prior the accident were painful and piercing, whereas the headaches after the accident were better

described as a constant thud and unrelenting pressure. (A-77-78).

Additionally, the day after the accident, while mid-conversation, a vertical portion of one of Male Plaintiff's teeth, tooth #23, broke off. (A-73-74). Male plaintiff testified that he had an issue with that tooth in the past but following some dental work in 2008, he had not had any problems with it in the three years leading up to the accident. (A-75). Male Plaintiff was able to get in to see his dentist a few days later to have the tooth examined, at which time his dentist heard the popping in his jaw and a brief conversation about TMJ followed. (A-79).

In addition to his physical complaints, Male Plaintiff reported changes in his mood and temper. (A-83). Male Plaintiff tried to combat his pain and soreness with over the counter medication, but when the pain did not dissipate, he contacted his primary care doctor, Dr. Bianchi. (A-80). At his initial appointment, Male Plaintiff documented complaints concerning his jaw, headache, and ringing in the ear. (A-81). Dr. Bianchi referred Male Plaintiff to several specialists, who prescribed different medications, but still the pain persisted. (A-81-83).

Over the course of the next several months, Male Plaintiff treated with several specialists for his psychological and physical complaints. Specifically, he underwent a series of Botox injections for his headaches which provided him some relief. (A-92-93). He was examined by Dr. Dettwyler for his temper, a problem he had never had before the accident, and was put on medication to help flat line his

temper (A-89-90; A-93).

Although Male Plaintiff was referred to a neuromonics program for his tinnitus, between his wife's ailing health and the costs and time associated with the program, he was unable to commit. (A-85-86). However, he did report to Jefferson where he received a set of ear plugs to help with loud noises and testified that he plans to follow up with the neuromonics testing in the near future. (A-94).

Despite the above treatment, and several other attempts at other treatment methods and medication, Male Plaintiff reported that he still experiences both physical and psychological problems from the accident. His chief complaint is the tinnitus, which he described as loud and constant, and disturbing to his sleep and concentration. (A-95; A-97). He also continues to hear and deal with the popping in his jaw which he described as tense and tight. (A-80-81). He is still missing tooth #23 and intends to have a permanent denture put in. (A-96). He also still has to get Botox in order to keep the post-accident headaches under control. (A-102). Additionally, he continues to report problems with his mood and memory.

Defendants presented two medical experts, both of whom testified at trial. Jack Spector, Ph.D., ABPP, was offered as an expert in the field of neuropsychology with expertise in concussion and post-concussive syndrome. (A-147). Dr. Spector testified that he examined Male Plaintiff on one occasion in April 2015. (A-158). Based upon his examination, as well as a review of Male

Plaintiff's medical records, Dr. Spector opined that Male Plaintiff approached the evaluation in an effortful manner, giving the test his best shot, with no evidence to suggest that Male Plaintiff was trying to manipulate the test in any way. (A-158; A-171).

Dr. Spector's observations during the test were that Male Plaintiff had a working memory, with simple attention skills intact, but noted that there was evidence of scattered inefficiencies in elements of complex attention and vigilance. (A-160). The diagnostic impression was of a minor neurocognitive disorder probably related to his physical complaints and distraction due to same, and of psychological factors effecting general medical condition. (A-160-61). Dr. Spector acknowledged that depression and anxiety, which Male Plaintiff had a history of, can make a person more sensitive to adversity, including physical complaints, following an incident. (A-161). This, however, does not imply that an individual's prior emotional problems negate the possibilities of a concussion. (A-161). He followed this acknowledgment by quoting a professor's observation that "nobody ever gets better after a hit on the head." (A-161). While the average recovery time for a concussion is approximately days, someone who is disposed to pre-existing issues may take months to heal. (A-162).

Dr. Spector recognized that diagnosing someone with a concussion can be a little less clear cut. (A-161). While Dr. Spector testified that concussions can

occur without loss of consciousness, he noted that momentary loss of consciousness can occur without awareness of the person involved, further noting that loss of consciousness for brief periods of time is generally difficult to determine. (A-172-73).

He opined that, while there didn't seem to have been post-concussive amnesia which usually marks mild traumatic brain injury, feelings of confusion and dazedness are enough to propel a person into the lowest reaches of a low-grade concussion. (A-163). In fact, being dazed is one of the symptoms occurring in someone who suffered a mild traumatic brain injury. (A-174). Other common concussion symptoms include headaches, sleep disturbance, visual disturbance, hearing-related issues, mental fogginess and attention and subjective memory deficits as well as irritability and depression. (A-176-77). Dr. Spector testified that upon a review of Male Plaintiff's medical records, the aforementioned symptoms appeared consistently throughout. (A-178). Moreover, it was Dr. Spector's expert opinion that rapid acceleration and/or deceleration of the head is the most common source of mild traumatic brain injuries in motor vehicle accidents. (A-173).

As to future medical treatment, Dr. Spector testified that he would recommend Male Plaintiff undergo an independent neuropsychiatric evaluation, which would likely cost a couple thousand dollars. (A-181-83). He further opined

that much of Male Plaintiff's physical complaints, subjective discomfort, fatigue, insomnia, cognitive complaints and middle inertia would respond favorably to an attempt at pharmacotherapy. (A-183). Additionally, Dr. Spector recommended that Male Plaintiff see a consultation liaison psychiatry or behavioral medical or psychologist and undergo a course of cognitive behavioral or psychotherapy. (A-184).

Dr. Spector testified that both Dr. Grossinger and Dr. Townsend diagnosed Male Plaintiff with a concussion with traumatic brain injury symptoms causally related to the motor vehicle accident. (A-186-87). Additionally, he agreed that Dr. Langan attributed a portion of the problems to the brain injury sustained in the accident. (A-187). Ultimately, Dr. Spector concluded that, within a reasonable degree of medical probability, Male Plaintiff sustained an injury as a result of the motor vehicle accident at issue (A-188-89).

Defendants also called Jeffery Wolf, M.D., FACS as an expert. Dr. Wolf is board certified in otolaryngology and testified as an expert. (A-199-200). Dr. Wolf examined Male Plaintiff in April 2015. (A-212). He opined that Male Plaintiff did not seem to be exaggerating any of his symptoms and came across as a straight shooter. (A-212).

Dr. Wolf testified that shortly after the accident, Male Plaintiff began to complain of tinnitus, which is defined as hearing noises that aren't there. (A-201).

Dr. Wolf testified that usually tinnitus sets in pretty immediately following an accident, but with all of the adrenaline associated with an accident, it would not be uncommon for one to not necessarily notice it immediately. (A-215-16). He testified that there are two types of tinnitus; objective tinnitus meaning there is a problem with the blood vessels and someone else can hear the ringing, and subjective tinnitus in which only the person who has it can hear the ringing. (A-201). Dr. Wolf testified that Male Plaintiff's medical records showed a history of OCD and depression which could predispose someone to subjective tinnitus following an accident and cause it to last longer than someone without a psychological history. (A-216).

Dr. Wolf explained that a hearing test was performed, as well as an otoacoustic emissions test, which is a test performed on the inner ear to check that the cochlea, or hearing system, is intact. (A-203-04). While the otoacoustic emissions test can tell if someone has trauma to the ear or head causing damage to the cochlea, it cannot confirm that someone has tinnitus. (A-205). Thus, while the results of Male Plaintiff's otoacoustic emissions test evidenced that the ear itself did not sustain any trauma, it could not rule out the tinnitus. (A-206). Dr. Wolf testified that a person could still have subjective tinnitus despite having no trauma or problems to the ear itself. (A-214). Furthermore, there was nothing to actually rule out tinnitus (A-227-28).

In addition to the tinnitus, Dr. Wolf testified that Male Plaintiff complained of TMJ. A review of the records, showed that Male Plaintiff complained of jaw pain shortly after the accident and persistent pressure in his jaw shortly following the accident and on-going. (A-202). He also testified that there was a click in the joint of his jaw which Dr. Wolf testified is commonly associated with TMJ and is not something that can be manipulated or done on purpose. (A-206-07). While the existence of TMJ can be proven through an MRI, no MRI was performed in the instant case. (A-206). However, while there was no MRI, there also wasn't anything which could rule out TMJ. (A-207). Based on a review of records and Male Plaintiff's history that it started after the accident, Dr. Wolf testified that the TMJ would be related to the accident. (A-213).

Dr. Wolf also testified regarding tooth #23 that cracked the day after the accident. Dr. Wolf testified that there was a record from 2008 or 2009 which described tooth #23 as not vital. (A-209). Other than the 2008 record, there weren't any other records documenting complaints to tooth #23. (A-219). While Dr. Wolf testified that it would be unusual for a tooth not to split until two days after an accident, the timing and circumstances were suspicious. (A-220-21). He further testified that clenching down in an accident could certainly aggravate a non-vital tooth causing it to fall out quicker than it otherwise would. (A-222). Additionally, since the tooth was non-vital, it was possible that, despite being

injured in the accident, Male Plaintiff may not have had pain and therefore not have been aware until it fully cracked. (A-223).

John B. Townsend, III, M.D. testified for Plaintiffs. Dr. Townsend is a licensed medical doctor and board certified neurologist. (A-12 at 6-8). Dr. Townsend testified that a review of Male Plaintiff's medical records pre-dating the accident, evidenced issues with anxiety in 2009, sleep apnea for which a sleep study was performed, a visual problem in one eye around 2009 which lead to several tests and ultimately a diagnosis of migraines, and some depression in 2011 associated with his wife's diagnosis of cancer. (A-13 at 11:22-12:4). Notably absent in the medical records was any presence of tinnitus or complaints of memory loss. (A-13 at 13:11-18).

Initially, Male Plaintiff followed up with his primary doctor complaining of clicking in his ear, jaw pain, and tinnitus. (A-13 at 12:22-13:3). He had also had an MRI of his brain performed and followed up with an oral surgeon for his cracked tooth, and an ENT doctor, Dr. Hockstein, in relation to the tinnitus. (A-13 at 13:4-10). Dr. Hockstein opined that Male Plaintiff had tinnitus and headaches related to the motor vehicle accident and referred Male Plaintiff to Dr. Grossinger. (A-14 at 14:2-9). Dr. Grossinger's records evidenced complaints of headaches, nausea, fatigue, sensitivity to noise, mental foginess and ringing in his ears, which are classic symptoms of concussion. (A-14 at 14:18-24).

Despite his treatment with Dr. Grossinger, which included different medications, Male Plaintiff was not improving as hoped and was referred to Dr. Townsend. (A-14 at 17:5-15). Dr. Townsend first examined Male Plaintiff on November 28, 2011. (A-13 at 10:4). Male Plaintiff reported a constant ringing in his ears, headaches, poor mood and memory lapses. (A-15 at 18:1-7). Based on Male Plaintiff's history and complaints, Dr. Townsend diagnosed Male Plaintiff with a concussion. (A-15 at 18:8-10). He also referred Male plaintiff to Jefferson for his tinnitus. (A-15 at 18:8-20). Due to complications getting approval to go through the program, as well as his wife's health, Male Plaintiff was not seen at Jefferson immediately. (A-15 at 19:9-17). Eventually, in January 2012, Male Plaintiff was seen at Jefferson where he described the tinnitus as a screeching noise that was associated with pain and underwent an audiology evaluation which evidenced mild decreased hearing. (A-15 at 20:20-23).

Thereafter, Male Plaintiff followed up with his family doctor, doctors at John Hopkins and at the University of Pennsylvania, all the while complaining of constant ringing in his ears and memory loss. (A-15 at 21:7-10). He again followed up with Dr. Townsend in September 2012 with complaints of persistent tinnitus and headaches. (A-15 at 21:19-23). Accordingly, Dr. Townsend referred Male Plaintiff to Dr. Langan, a neuropsychologist. (A-16 at 22:24-23:2).

Following the results of Dr. Langan's testing, Dr. Townsend started Male

Plaintiff on a regiment of medication and referred him to Bryn Mawr Rehabilitation for cognitive rehabilitation. Dr. Townsend also referred Male Plaintiff to Dr. Dettwyler who, is a psychologist with an interest in post-concussive syndrome. (A-17 at 27:7-24). Despite exercising multiple forms of therapy, medication and treatment, Male Plaintiff still evidenced post-concussive symptoms, including headaches and tinnitus. Accordingly, Dr. Townsend referred Male Plaintiff for Botox injections to help with the headaches and to the Neuromonics program at Jefferson for his tinnitus. (A-17 at 29:24-18 at 30:1-23). The Botox provided some relief.

Dr. Townsend testified that when it comes to tinnitus, there really isn't any single objective test to conclusively prove someone has tinnitus. (A-21 at 45:16-19). There was no prior problems of tinnitus, and he complained of it immediately following the accident and it has been persistent ever since. (A-21 at 44:12-22). On cross examination, Dr. Townsend further testified that when Male Plaintiff went for the Neuromonics testing at Jefferson, Male Plaintiff was able to match the pitch to a pitch they presented to him, and they made determinations that he was within a hearing pitch range. (A-22 at 46:1-9). In addition to his testimony regarding tinnitus, Dr. Townsend testified as to the presence of temporomandibular joint dysfunction (TMJ), noting the clicking of the jaw in the medical records.

When asked how Male Plaintiff's prior anxiety, depression and OCD

factored into his recovery, Dr. Townsend testified that generally people with this pre-existing condition tend not to do as well as far as getting better. (A-18 at 32:12-21).

Ultimately, Dr. Townsend testified that Male Plaintiff suffered a mild traumatic brain injury also known as post-concussive syndrome with associated tinnitus. (A-18 at 33:19-22). He further opined that the accident aggravated headaches and caused cognitive issues, including memory problems, problems with organization, speed of processing, etc. (A-19 at 34: 16-22). Dr. Townsend opined that these symptoms would affect Male Plaintiff's ability to efficiently complete things, make him more irritable, cause continued pain complaints and difficulty concentrating. (A-19 at 36:2-10). He also concluded that as a result of the accident, Male Plaintiff sustained a permanent injury to the brain because of the cognitive issues, permanent injury of the inner ear because of the ringing in the ear, and permanent injury to the head because of the aggravation of headaches. (A-19 at 36:11-37:10). These permanent injuries would require future medical treatment including: medication, Botox, quarterly doctor visits with his primary care doctor or Dr. Townsend, enrollment in a Neuromonics program and full treatment at a facility (A-19-20). He estimated that over the course of a lifetime, Male Plaintiff would incur approximately \$382,000 in future medical care. (A-20).

James Langan, Psy.D. testified by way of deposition for Plaintiffs. Dr.

Langan is a licensed psychologist in the State of Delaware and is board certified in neuropsychology. (A-24-25). He evaluated Male Plaintiff on November 21, 2012 upon referral from Dr. Townsend. (A-26 at 11:3-13). At the time of his evaluation, and months after the accident, Male Plaintiff was still experiencing tinnitus, cognitive problems, headaches, attention and focusing problems, trouble sleeping and emotional problems. (A-26-27; A-30). Over the course of approximately 45 minutes to an hour, Dr. Langan took a history of Male Plaintiff prior to conducting approximately four hours of tests. (A-26 at 12:1-10; A-33 at 39:13-22).

Dr. Langan testified that the initial set of tests were performed to ensure that the person is making a valid effort on the tests. (A-27 at 16:1-23). He testified that at no point did Male Plaintiff appear to be giving less than 100% effort on the tests. (A-27 at 17:6-24). Thereafter, Dr. Langan performed a series of other tests which are designed to measure a range of things including problem solving abilities, memory, verbal learning, etc. (A-28). These tests all lead to the psychological functioning and the MMPI which Dr. Langan described as a 337 true/false psychological test. (A-29 at 23:2-17). Dr. Langan testified that the tests revealed problems maintaining a consistent level of attention over longer periods of time as well as memory problems. (A-29 at 25:1-10).

It was Dr. Langan's expert testimony that Male Plaintiff's complaints met

the criteria for post-concussion syndrome. (A-30 at 26:2-11). Dr. Langan attributed the post-concussive syndrome to the motor vehicle accident at issue. (A-30 at 27:4-8). This was based, in part, on the fact that prior to the accident, there were no prior complaints of tinnitus, cognitive dysfunction, memory dysfunction or balance issues. (A-30 at 27:10-22). While Male Plaintiff had admitted to some emotional problems prior the accident, Dr. Lagan felt that there was sufficient diagnostic certainty to diagnose post-concussive syndrome in light of the accident characteristics. (A-30).

Additionally, Dr. Langan testified that the test results were consistent with Male Plaintiff's subjective complaints. (A-30 at 27:22- 28:15). This was based on the fact that Male Plaintiff's results were not exaggerated and show problems in areas that he complained about, specifically, focusing and memory problems, as well as emotional changes; thus establishing a degree of clinical correlation with his complaints. (A-30 at 28-29).

Based on all of the above, and Dr. Langan's experience, Dr. Langan recommended that Male Plaintiff see an ear nose and throat physical for his balance dysfunction, a psychiatrist for his mood instability, and psychotherapy sessions. (A-30 at 29:1-20). He also recommended medication to help with the symptoms. (A-30 at 29:7-8).

Dr. Langan was asked about Dr. Spector's report. Dr. Langan testified that

he agreed with Dr. Spector that Male Plaintiff suffered a grade 1 concussion, but in addition to that diagnosis, observed the presence of persistent complaints, including tinnitus. (A-31 at 32:14-33:3). He further stated that while Dr. Spector is correct that a vast majority of people do recovery quickly from this type of concussion, a minority do not, and Male Plaintiff is in that minority. (A-31 at 33:1-9).

On cross examination, Dr. Langan testified that prior to the testing, while he was aware of Male Plaintiff's history of depression, he was unaware of any obsessive compulsive disorder. (A-32 at 36:17-20). He admitted that while they are not main symptoms that accompany obsessive compulsive disorder, worry, lightheadedness and dizziness could accompany OCD. (A-32 at 37:3-18). However, he testified that even upon learning of the OCD diagnosis, his opinion remained the same as to Male Plaintiff's diagnosis. (A-38 at 58:4-10).

Dr. Langan also testified that there were no prior test results providing a baseline for some of the testing, so he measured the testing against a standardization sample of persons of the same background, age, etc. (A-33 at 40:16-23). He testified, however, this practice of statistics and inferences was normal within the practice of neuropsychology. (A-34 at 41:6-18).

Lastly, Dr. Langan conceded that to some degree, all of the tests involve a subjective component. (A-34 at 42-43). This, he testified, is why it is so important

to perform tests to establish the truthfulness and credibility of the test taker, which he found Male Plaintiff to be. (A-37 at 57:9-11).

In addition to the four medical experts, Female Plaintiff testified. Female Plaintiff testified that since the accident, Male plaintiff has been in pain every day, his quality of life is different, he is short tempered and snaps when talked to in the right ear because of the pain. (A-234). She further testified that he has trouble sleeping and his mood has been adversely affected. (A-236). To the extent Male Plaintiff has not followed through with all of the recommended treatment, Female Plaintiff testified that it is because of the demand of his job and difficulty getting off from work. (A-236-37). She also testified that since the accident he has not been himself. (A-236).

I. THE TRIAL COURT’S DECISION DENYING PLAINTIFFS’ MOTION FOR A NEW TRIAL PURSUANT TO SUPERIOR COURT RULE 59 WAS AN ABUSE OF DISCRETION AND THEREFORE PLAINTIFFS ARE ENTITLED TO A NEW TRIAL

A. Question Presented

Whether the Trial Court’s decision denying Plaintiff’s Motion for a new Trial pursuant to Superior Court Rule 59 Constitutes an abuse of discretion therefore entitling plaintiffs to a new trial pursuant to Superior Court Rule? (A-2-3; Exhibit A).

B. Scope of Review

The Supreme Court reviews the Superior Court’s denial of a motion for a new trial under an abuse of discretion standard. *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997) (citing *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979)).

C. Merits of Argument

The jury’s verdict awarding Plaintiffs zero dollars in damages despite a finding that defendant’s negligence proximately caused injury is unacceptable as a matter of law.

It is well settled under Delaware law that a jury’s verdict is given enormous deference by the Court and, absent exceptional circumstances, the amount of damages awarded by a jury is presumed to be correct. *Cooke & Koutoufaris v. Murphy*. 2014 Del. LEXIS 349, *6 (Del. 2014). However, while a jury has great latitude, “it cannot totally ignore facts that are uncontroverted and against which no

inference lies.” *Maier*, at 749 (citing *Haas v. Pendleton*, 272 A.2d 109, 110 (Del. Super. Ct. 1970)). When a plaintiff challenges a jury’s award of zero damages, the court must determine “whether a reasonable jury could have returned a verdict of zero damages based on the evidence presented.” *Id.*

While a myriad of cases have addressed zero dollar jury verdicts in the presences of injuries proximately caused by a defendant’s negligence, the seminal case on this issue is *Maier*. *Maier* dealt with a claim for personal injuries suffered as a result of a motor vehicle accident. *Id.* at 748. Directed verdict was entered in favor of plaintiff as to liability and thus, the jury’s sole function was to determine the amount of damages plaintiff should be awarded. *Id.* The jury returned a verdict of zero. *Id.* On appeal, this Court determined that while the seriousness of plaintiff’s injuries were contested, the medical experts for both parties agreed that plaintiff suffered some degree of injury as a result of the accident. *Id.* at 749. Accordingly, this Court held, where there is uncontracted medical testimony that a plaintiff suffered an injury as a result of the accident at issue, an award of \$0 is inadequate and unacceptable as a matter of law. *Id.* Moreover, once the existence of an injury has been established as causally related to the accident, a jury is required to return a verdict of at least minimal damages. *Id.*

This Court most recently dealt with this issue in *Cooke*. In *Cooke*, Plaintiffs Cooke and Koutoufaris claimed injuries resulting from a motor vehicle accident.

While the jury denied that Cooke had sustained injuries as a result of the accident, they found that proximate cause existed as to Plaintiff Koutoufaris's injuries and defendant's negligence. *Cooke*, at *4. Much like the present case, despite the finding of injuries proximately resulting from the defendant's negligence, the jury awarded \$0 in damages to Plaintiff Koutoufaris. *Id.* That, however, is where the similarities between *Cooke* and the present case cease.

In *Cooke*, this court held plaintiff's lack of credibility laid a sufficient basis for the jury to reasonably question plaintiffs' expert's testimony which was based solely on plaintiff's subjective injuries. *Id.* at 7. (See also *Amalfitano* which stated that a jury may reject an expert's medical opinion when that opinion is substantially based on a subjective complaint of the patient. *Amalfitano v. Baker*, 794 A.2d 575 (Del. 2001)). Because the expert's opinion was based solely on the plaintiff's subjective complaints, the court pointed to Plaintiff's own lack of failure to timely and consistently seek treatment as the basis upon which the jury could reject the expert's testimony. *Id.*

The present case is distinguishable from *Cooke* for two key reasons: (1) Male plaintiff in the instant case was perceived as credible by all accounts and (2) male plaintiff offered both subjective *and* objective evidence of his injuries.

Plaintiffs offered the expert testimony of Dr. Townsend and Dr. Langan. Dr. Langan testified that Male Plaintiff's subjective complaints were consistent with the

results from tests performed in November 2012. (A-30 at 28:12-15). He further testified that Male Plaintiff exhibited post-concussion syndrome that was attributable to the accident and that Male Plaintiff's test results were consistent with someone who sustained a closed head injury in a car accident. (A-30 at 28:16-19). Dr. Townsend testified that Male Plaintiff suffered from mild traumatic brain injury, or post-concussive syndrome, and associated with that is the persistent tinnitus. (A-18 at 33:18-22). This also aggravated the pre-existing headaches and brought on cognitive dysfunction such as memory issues. (A-18-19). He further testified that Male Plaintiff suffered permanent injuries including injury to the brain because of cognitive issues, injury to the inner ear because of the ringing in the ear and injury to the head based on the aggravation of headaches (A-19 at 37:1-10).

Defendants offered the testimony of Dr. Spector and Dr. Wolf. Dr. Spector testified that headaches, sleep disturbance, visual disturbance, hearing-related issues, mental foginess and attention and subjective memory deficits as well as irritability and depression are all common symptoms of post concussive syndrome. (A-176-77). He further testified that a review of Male Plaintiff's medical records revealed the aforementioned symptoms appearing consistently throughout. (A-178). He ultimately concluded, within a reasonable degree of medical probability, that Male Plaintiff sustained an injury as a result of the motor vehicle accident at

issue (A-188-89).

In addition to the subjective complaints detailed above, experts testified to objective findings. Dr. Wolf testified that Male Plaintiff suffered from TMJ. Male Plaintiff presented with a clicking in his jaw, a common sign of TMJ, and was without any objective evidence to rule out TMJ. (A-206-07). Additionally, while unable to definitively testify that tooth #23 cracked due to a particular instance, he testified that the circumstances and timing of the tooth cracking one day after the motor vehicle accident was suspicious, and clenching of the jaw upon impact could have absolutely caused the tooth to crack. (A-220-221). Furthermore, Dr. Langan testified that Male Plaintiff's jaw made a clicking noise when he opened it, again, consistent with TMJ.

Moreover, the testimony established that tinnitus was unable to be proven by way of objective tests. (A-21 at 45:16-19). Despite the lack of testing available to prove the testing, it was agreed upon by all experts and, the court below, that Male Plaintiff suffered from tinnitus. Additionally, Male Plaintiff testified that the neuromonic device provided relief. To penalize plaintiff because there is no test to objectively prove his subjective complaints would be unjust. Similarly, the psychological problems were unable to be proven objectively because there was no baseline upon which the experts could compare their results. A-34). However, experts compared Male Plaintiff's results to those similarly situated, which is the

normal procedure within the injury. (A-34). The results were consistent with the subjective complaints.

To the extent that Male Plaintiff's symptoms could not be proven through objective testing, all medical experts testified that Male Plaintiff was credible and did not appear to be exaggerating his symptoms or manipulating his tests. The strong evidence of Male Plaintiff's credibility only strengthens the legitimacy of his subjective complaints.

Based on the testimony offered by all four medical experts, it was unreasonable to doubt the existence of Male Plaintiff's injuries. Thus, Plaintiff's counsel was prompted to move to have the question asking 'whether plaintiff sustained injuries from the accident' removed from the verdict form. (A-293-95). While the judge agreed that the existence of injuries had been established, the jury's affirmative answer to question unequivocally established that they too found that male plaintiff was injured and that the negligence of the defendant was the proximate cause of said injuries.

Therefore, Male Plaintiff's injuries were proven through conclusive and undisputed evidence by all four medical experts, established by subjective and objective complaints, and/or unable to be disproven by objective testing. For these reasons, the Court determined below that an award of zero damages was unacceptable as a matter of law.

Plaintiff's position that a new trial is warranted is further supported by the findings of the court below. In reviewing the Plaintiff's Motion for a New Trial, the Court correctly pointed out that both parties' experts testified that there was at least some evidence that Male Plaintiff was injured as a result of the accident. This lead the Court to conclude that Plaintiff was therefore entitled to additur and/or a new trial.

However, it is at this point that plaintiffs find fallacy with the court below's opinion. The Court states that the jury essentially rejected the proposition that plaintiff proved he was entitled to an award of damages. However, to allow this to stand would be contrary to the Court's well recognized holding that once a plaintiff proves that he has suffered an injury, no matter how minimal, a jury award of zero damages is against the weight of the evidence and it is an abuse of discretion to deny a new trial. *Cooke*, 2014 Del. LEXIS 349, *6 (citing *Maier* at 748). The jury found that Male Plaintiff had sustained injuries, and the judge agreed. A finding of injuries, no matter how minimal, necessitates a finding of damages. Thus, by answering the question affirmatively on the verdict form, the jury was *required* to award damages, the failure of which should be remedied by a new trial.

Furthermore, the lower court below depreciates plaintiff's Motion for a New Trial as an attempt to secure a mulligan or "re-do." Plaintiff is not seeking a re-do. Male plaintiff's injuries were conclusively and undisputedly proven in the

September 2015 trial. Thus, what plaintiff seeks is compensation for said undisputed injuries.

The function of a damage award in civil litigation is to provide just and full compensation to a plaintiff who suffers injury or loss at the hands of a tortfeasor. *Jardel Co., Inc. v. Hughes*, 523 A.2d 518 (Del. 1987). The decision of the court below to deny a new trial and, alternatively award additur in the amount of \$10,000, fails to provide plaintiffs with just and full compensation for the conclusively established injuries suffered as a proximate result of the defendant's negligence. Therefore, as a matter of law, the verdict cannot stand and plaintiffs are entitled to a new trial.

ARGUMENT

II. THE TRIAL COURT'S AWARD OF \$10,000 FOR ADDITUR WAS UNREASONABLE

A. Question Presented

Was the additur award of \$10,000 which failed to award anything for pain and suffering or future medical costs reasonable? (A-20; Exhibit C).

B. Scope of Review

This Court reviews the amount of the additur award for abuse of discretion. *Reid v. Hindt*, 976 A.2d 125, 131 (Del. 2009)(citing *Murphy v. Thomas*, 2002 WL 1316242, at *1 (Del. 2002)).

C. Merits of Argument

In the event that this Court finds that the Court below correctly denied Plaintiffs motion for new trial, Plaintiffs contend that amount awarded by additur (\$10,000) was unreasonable.

Delaware courts have a long history of using additur and remittitur to adjust jury verdicts. *Reid v. Hindt*, 976 A.2d 125, 129 (Del. 2009). While additur is typically a remedy sought by plaintiffs, and remittitur sought by defendants, either party may seek that relief, or the trial court may impose them *sua sponte*. *Id.* at 131. In both additur and remittitur, the Court has ruled as a pre-requisite that the verdict amount is legally improper and cannot be made legally acceptable unless raised or lowed. *Carney v. Preston*, 683 A.2d 47 (Del. Super. Ct. 1996). When

determining whether additur or remittitur are proper, the court must evaluate the evidence and decide whether the jury award falls within a supportable range, while still deferring to the jury. *Id.*

In the present case, the court concluded that plaintiff is legally entitled to some relief, thus awarding additur. The Court awarded Plaintiffs \$8,000 to cover the cost of a Neuromonics Unit and an additional \$2,000 in allowance for related office visits, thus totaling an award of \$10,000.

In determining a reasonable additur amount, the Court must determine what the record justifies as an absolute minimum giving every reasonable factual inference to the defendant. *Reid*, at 131. Even when giving the defendant every reasonable factual inference, the amount awarded in the present case is unreasonable. Plaintiffs' contention that the amount of additur awarded is unreasonable is two-fold: (1) the additur awarded failed to grant any compensation for pain and suffering and (2) the additur granted failed to grant reasonable consideration for future medical treatment. Plaintiffs will address each basis in turn.

1. The Trial Court's award of additur was unreasonable as it failed to award any compensation for Male Plaintiff's pain and suffering despite a finding that Male Plaintiff was injured as a proximate cause of the accident.

The Delaware Supreme Court has repeatedly approved the use of additur in

personal injury claims. *Reid*, at 130. However, courts have recognized the difficulty in determining the appropriate amount of additur in personal injury litigation where the jury returns a zero verdict. *Layton v. Elterich*, 2012 WL 2026295, at *3 (Del. Super. Ct. Jan. 24, 2012). The difficulty originates in the context of unliquidated damages, such as pain and suffering, which are not mathematically calculable. *Id.* The courts in *Hagedorn* and *Layton* both found that the jury's verdict of \$0 failed to provide a sufficient basis on which the court could determine the appropriate amount of additur, therefore finding that additur was inappropriate and a new trial was warranted. *Id.*; *Hagedorn v. State Farm Mut. Ins. Co.*, 2011 WL 2416737 (Del. Super. Ct. June 10, 2011).

As discussed extensively above, by all accounts, Male Plaintiff suffered an injury as a proximate cause of defendant's negligence. All experts agreed to this end, the jury agreed as evidenced by the verdict form, and the judge agreed, as evidenced by his opinion granting additur. Thus, the issue before the court in granting additur was the *extent* of the injuries suffered and what award would be necessary to compensate the plaintiffs and to what degree. Despite the consensus that Male Plaintiff sustained injuries proximately caused by the accident, the additur granted fails to award *anything*, even nominal damages, for Male Plaintiff's pain and suffering.

The court in *Junginer* pointed to the following three factors when

determining additur: (1) pain and suffering, (2) medical bills above PIP, and (3) the minimal nature of the plaintiff's injuries. *Junginger v. Betts*, 2008 Del. Super. LEXIS 130, at *7-8 (Del. Super. Ct. Apr. 9, 2008).

In *Reid*, the lower court awarded \$2,500 despite medical bills in evidence totaling \$7,552.36. *Reid*, at 131. The award of \$2,500 was based on the plaintiff's testimony that she improved within 10 weeks of the accident and there were no objective signs of deficits. *Id.* This testimony, coupled with the trial judge's reasoning that he was not persuaded that any of the expenses making up the \$7,552.36 were proximately related to the injuries plaintiff sustained, constituted substantial evidence to support the decision. *Reid v. Hindt*, 2008 Del. Super. LEXIS 240, *4 (Del. Super. Ct. July 31, 2008). Thus, since the judge had determined the claimed medical expenses were not related to the accident, the \$2,500 was not to cover medical expenses, but rather, granted as compensation for the 10 weeks of pain and suffering plaintiff experienced as a result of her injuries.

In the present case, plaintiff was awarded \$10,000, which only accounted for specified future medical expenses. Thus, no award was granted for pain and suffering. Even in cases where plaintiff's pain and suffering lasted only weeks, plaintiffs were awarded some compensation for pain and suffering. The Male Plaintiff in the present case testified that he continues, years after the accident, to suffer from psychological and physical issues related to the accident. His injuries

have been determined to be permanent in nature. He has ongoing memory issues, constant tinnitus, and persistent jaw pain. (A-97; 93). Additionally, he testified that he still gets headaches which are only reduced by Botox injections. (A-94). Accordingly, plaintiff submits that the lower's courts failure to award any amount for pain and suffering, despite a finding that Male plaintiff had suffered injuries as a result of the accident, was unreasonable.

2. The Trial Court's award of additur was unreasonable as it failed to grant reasonable compensation for future medical care.

Where damages are liquidated, the inquiry as to reasonableness is less troublesome and less arbitrary. The Table of Contents to Plaintiffs' trial exhibit binder lists medical expenses for future medical care in excess of \$380,000.³ No expert on behalf of both parties disputed that Male Plaintiff would require future medical care. However, additur was only granted for \$10,000 and directed towards two specific expenses. Based on the testimony offered by both parties' experts, and the trial exhibits before the Court, an award of \$10,000 for future medical care is unreasonable.

Plaintiff's medical expert, Dr. Townsend testified that Male Plaintiff would incur future medical costs over the remainder of his life. (A-20 at 38:7- 40:5). Dr. Townsend broke his cost evaluation down as follows:

- four doctors appointment with either himself or a family care physical, each

³ Table of Contents to Plaintiff's Trial Exhibit is attached hereto as Exhibit C.

visit costing approximately \$200, thereby totaling about \$800 a year;

- outpatient tinnitus therapy and a Neuromonics unit which itself costs \$8000;
- four Botox injections year, costing approximately \$2,200 a month;
- medication for his headache and mood at approximately \$2,000 a year – this is estimated considering generic prescriptions. (A-20 at 38:7- 40:5).

These estimations taken over a life time, equal approximately \$382,000 in future medical expenses. (A-20 at 38:7- 40:5). Dr. Townsend further testified that all of the aforementioned treatment and costs would be reasonable, necessary and casually related to the accident at issue. (A-20 at 38:7- 40:5).

Additionally, Dr. Spector testified that it was his recommendation that Male Plaintiff undergo an independent neuropsychiatric evaluation, which, he testified, would likely cost a couple thousand dollars. (A-181-85). Additionally, he testified that Male Plaintiff would benefit from pharmacotherapy as well as a consultation for a course of cognitive behavioral or psychotherapy. (A-181-85).

Despite this testimony from both parties' experts, and the costs associated with it which was submitted into evidence, plaintiffs were awarded only \$10,000, of which, only \$2,000 was awarded as an allowance for office visits.

Plaintiff appreciates that the lower court's award of the cost of the Neuromoncis Unit was based upon the fact that no expert doubted that Male Plaintiff suffered from tinnitus and that he felt relief when he tested the device. It

follows then, that the other treatment costs associated with the tinnitus should have been awarded as well. Based on the trial exhibit, combined with Dr. Townsend's therapy, the costs for outpatient therapy alone amount to \$3,000 (\$250 a visit x 6 visits over 2 years). (A-20 at 38:7- 40:5). Thus, the award of \$2,000 for additional related office visits does not even cover the costs associated with treatments for the tinnitus.

Additionally, Male Plaintiff distinguished the post-accident headaches from the pre-accident headaches. He testified that the Botox injections provide relief for his otherwise unrelenting headaches. (A-94). No medical expert disagreed that he had suffered at least a grade 1 concussion and there was ample testimony that Male Plaintiff's ongoing complaints are consistent with post-concussive syndrome.

Additionally, both plaintiffs' and defendant's medical experts testified that Male plaintiff would benefit from pharmacotherapy, or medication. The trial exhibits estimate \$64,000 worth of costs for medication alone over the course of Male Plaintiff's lifetime, and this is a conservative estimate as Dr. Townsend gave this based on generic prescription costs.

For the aforementioned reasons, the award of additur, even when viewing all the evidence in the light most favorable to the defendant, is unreasonable and should not stand.

CONCLUSION

The Court erred as a matter of law in denying Plaintiff's motion for new trial when the jury returned a verdict of zero dollars despite finding that Male plaintiff sustained injuries as a proximate cause of Defendant's negligence. Furthermore, the Court's decision to award additur in the amount of \$10,000 was unreasonable as it (1) failed to account for pain and suffering despite the uncontradicted evidence of injuries and (2) granted an unreasonable award for future medical expenses. Therefore, Plaintiffs respectfully request this Honorable Court reverse the decision of the court below granting additur in the amount of \$10,000 and remand the matter for a new trial as to damages only.