IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NICASIA CIVARELLI,	)	
	)	C.A. No. 99C-03-100 - JTV
Plaintiff,	)	
	)	
	)	
5.	)	
	)	
JEANETTE BACCHETTA,	)	
	)	
Defendant.	)	

Submitted: October 23, 2001
Decided: January 15, 2002

Kenneth M. Roseman, Esq., Wilmington, Delaware. Attorney for Plaintiff.

Colin M. Shalk, Esq., Wilmington, Delaware. Attorney for Defendant.

Upon Consideration of Defendant's
Motion for a New Trial or Remittitur
DENIED

VAUGHN, Resident Judge

Civarelli v. Bacchetta
C.A. No. 99C-03-100 JTV
January 15, 2002

ORDER

Upon consideration of the defendant's motion for a new trial, the plaintiff's response, and the record of the case, it appears that:

1. A jury awarded the plaintiff $215,795.90 for personal injuries arising out of an automobile accident. The primary injuries were two fractures to the plaintiff's pelvis and a herniated disc at the lumbar portion of the spine. Medical bills submitted to the jury were $4,420.18. Other elements of damages claimed by the plaintiff were past and future pain and suffering and permanent impairment.

2. The defendant has moved for a new trial, contending that the verdict is so excessive that a new trial or remittitur should be granted. In support of her motion, she contends that one of the plaintiff's treating physicians, Dr. Johnson, was improperly permitted to express a medical opinion that the plaintiff's injuries might necessitate a fusion in the future at the sacroiliac joint, although neither he nor any other expert testified that such a procedure was medically probable. She also contends that Dr. Raisis, an expert called by the defense, was also improperly permitted to testify that surgery for the herniated disc might be needed even though his opinion was not stated in terms of reasonable medical probability. She contends that a physician's opinion that an injury may require future surgery is admissible only if there is a reasonable medical probability that such surgery will be necessary, a standard not met as to the above-mentioned testimony of Drs. Johnson and Raisis. She also contends that of the four medical experts who testified, only one, Dr. Yezdani, a family physician, thought that surgery for the herniated disc was probable, even though a neurosurgeon with whom he consulted, Dr. Kraut, did not agree with that opinion. She also contends that the opinion of Dr. Yezdani, a non- surgeon, about future surgery was offered without any explanation as to what type of surgery might be needed or when surgery might be needed. She contends that the above-mentioned evidence suggested to the jury that two future surgeries might be necessary even though no expert thought that the one, the fusion, was probable, and no treating physician had any plans for performing any surgery for the herniated disc. She also contends that

the jury's verdict is so excessive that it is reasonable to conclude that the jury improperly included an allowance for the cost of future surgery, even though the record contains no evidence of any such future cost, and also for pain and suffering associated therewith.

3. The plaintiff opposes the defendant's motion and contends that the testimony that the plaintiff might need surgery was relevant to her claim that her pain and suffering included mental anxiety and worry over whether she might have to undergo surgery in the future.

4. When considering a motion for a new trial, the jury's verdict is presumed to be correct.[1] A verdict should be set aside only when it is against the weight of the evidence,[2] or where the amount of an award "is so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice."[3] A jury's verdict should not be disturbed unless it is manifest that it was the result of passion, prejudice, partiality or corruption, or that it was clearly in disregard of the evidence or applicable rules of law.[4] The verdict must be manifestly and palpably against the great weight of the evidence or for some reason, or a combination of reasons, justice would

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[1] *Lacey v. Beck*, Del. Super., 161 A.2d 579, 580 (1960).

[2] *James v. Glazer*, Del. Supr., 570 A.2d 1150, 1156 (1990).

[3] *Young v. Frase,* Del. Supr., 702 A.2d 1234 (1997).

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

miscarry if it were allowed to stand.[5]

5. The evidence supported the following pertinent facts. The plaintiff's fractured pelvis required several days of inpatient hospitalization. The pelvis was fractured in two places, one in the groin or pelvic area, and one in the low back. For the next three or four weeks she needed help moving around and stayed with her daughter. After about eight weeks, she was able to return to work part-time. The pelvic fractures healed over a period of about three months, but she then began feeling low back pain which became progressively worse. She developed arthritic conditions at the site of the rear fracture. Dr. Johnson was her treating physician for the pelvic fractures. Approximately fourteen months after the accident, her family physician, Dr. Yezdani, sent her for an MRI, which showed a disc herniation in the low back. She continues to feel pain in her back. She has a sensation of weakness in her pelvic area, even though the fractures are healed. She also has intermittent neck pain. These conditions limit her daily activities. Her injuries are permanent. She still is unable to sleep on her left side. Sleeping on her left side causes her to feel "like my bones are crumpling," and is painful. She has anxiety and worry that at some point as she grows older she may require surgery. She testified that she discussed the possibility of surgery with Dr. Johnson. She stated that he told her he did not believe she would need surgery, but could not rule it out.

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

6. The testimony of Dr. Johnson which the defendant complains of is as follows:

> Q. Did you have any discussion with her at that point about a prognosis?
>
> A. Again, I discussed with her the need for, potential need for an injection in this region, which is oftentimes quite helpful. And in the worst case scenario, if someone has persistent symptoms, they're unresponsive to all other treatments, a fusion is oftentimes warranted.
>
> Q. Is it your opinion that that type of surgery will probably be required at some point in the future?
>
> A. Based on my examination of her, I do not believe that it will be necessary. My discussions with her about that as a potential was to inform her and educate her about her condition. I don't like patients being surprised or not knowing the full scope or potential ramifications of their injury.

7. During his testimony, Dr. Raisis responded to a question as follows:

> Q. Do you feel that Ms. Civarelli requires any treatment as a result of any findings in terms of the disc herniation on the MRI?
>
> A. She does not require surgery.

The testimony of Dr. Raisis which the defendant complains of followed shortly. It is as follows:

> Q. What is your opinion within reasonable medical probability as to whether Ms. Civarelli would ever require surgery as a result of the disc herniation?
>
> A. That's always a possibility. I think it's probable that she will not require surgery for that disc herniation.

8. The defendant contends that the above testimony violates the principle that when an expert offers a medical opinion it should be stated in terms of a "reasonable medical probability."[6] The plaintiff contends, in response, that it was relevant to a part of her pain and suffering claim, that is, worry and anxiety that she might have to undergo surgery at some future date. After considering the positions of both parties, my opinion continues to be that the plaintiff's contention is correct and the testimony was properly admitted. The plaintiff's anxiety and worry that she might have to undergo surgery in the future was a material part of her testimony. At one point she stated it was a "main concern." Mental anxiety over future possible consequences of an injury, including possible future surgery, is a compensable element of pain and suffering if there is a reasonable basis for such anxiety. The testimony of Dr. Johnson and Dr. Raisis that future surgery was a possibility was relevant to the reasonableness of her anxiety about future surgery. It was not offered to prove that the plaintiff will have surgery. The jury heard the testimony that surgery was possible in the full

[6] *Floray v. State*, Del. Supr., 720 A.2d 1132 (1998).

context of the doctors' opinions that, although possible, it was improbable.

8. Nor am I persuaded that the size of the verdict suggests that the jury must have factored in some amount for the cost of future surgery and pain and suffering associated therewith. This part of the defendant's argument asks the Court to speculate about what was going on in the jurors' minds. The cost of future surgery or pain and suffering from future surgery were never mentioned at any point during the trial by any witness or either attorney in opening statements or closing arguments. I also reject the underlying premise that a jury properly deliberating the case could not have arrived at a verdict in excess of $200,000. The evidence permitted the jury to infer that the plaintiff has permanent injuries which are painful and limit her daily activities. Where the evidence supports such a conclusion, a verdict of approximately $210,000 for pain and suffering and permanent impairment is not "so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice." The verdict was not against the weight of the evidence, and I find no reason to conclude that it was the result of passion, prejudice, partiality or corruption, or clearly in disregard of the evidence or applicable rules of law.

9. Therefore, the defendant's motion for a new trial or remittitur is ***denied***.

IT IS SO ORDERED.

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Resident Judge

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oc: Prothonotary
cc: Order Distribution