

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

| | | |
|----------------------|---|---------------------|
| ROSA LEE CLARK |) | |
| |) | |
| |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | C.A. No. 98C-01-135 |
| |) | |
| |) | |
| |) | |
| BRADLEY LEWIS WINGO, |) | |
| GEORGE W. ZERVAS, |) | |
| |) | |
| Defendants. |) | |

Date Submitted: December 4, 2002
Date Decided: January 21, 2003

CORRECTED ORDER

UPON PLAINTIFF’S MOTION FOR NEW TRIAL AND/OR ADDITUR

DENIED

On this 21st day of January 2003, upon consideration of the Motion for New Trial and/or Additur filed by Rosa Lee Clark (“Plaintiff”), it appears to the Court that:

- (1) Plaintiff filed personal injury actions against Bradley L. Wingo (“Wingo”)

Clark v. Wingo

C.A. No. 98C-01-135

January 21, 2003

Page 2 (Corrected Page)

and George W. Zervas ("Zervas") as a result of separate automobile accidents. The accident involving Wingo occurred on April 7, 1996 and the accident involving Zervas occurred on December 4, 1996. A jury trial was held commencing October 15, 2002. On October 18, 2002, the jury returned a verdict in favor of the Plaintiff in the amount of \$7,949.00, of which \$1,000.00 was attributable to the Defendant, Wingo, and \$6,949.00 to the Defendant, Zervas. In the October 28, 2002, Motion for New Trial and/or Additur, Plaintiff states that the jury returned its verdict shortly after receiving a response from the Court to a note that the jury had written regarding the medical bill of DelCare Plus. The jury questioned why the bill of DelCare Plus in the amount of \$8,445.44, was significantly lower than the total amount of all the charges on the bill (\$28,840.40). By agreement of the parties, the jury was told that the difference represents payments DelCare Plus received from the Plaintiff's no fault insurance carrier. Plaintiff argues that Plaintiff's treatment can be broken down over two time periods of December 5, 1996 to February 4, 1998 with medical bills totaling \$16,399.44 and October 18, 2001 to August 26, 2002 with medical bills totaling \$9,952.00. The crux of Plaintiff's argument is that because the jury awarded this particular balance, it is indicative that the jury wanted to award the Plaintiff's medical bills for the initial period of time, minus the DelCare Plus bill and thus it was incumbent upon them to make some award for pain and suffering. The jury awarded the Plaintiff \$7,949, however the difference in the medical bills for the

initial time period and the DelCare Plus bill is \$7,954. Plaintiff believes the \$5.00 difference can be accounted for due to a miscalculation. Plaintiff contends that simply awarding this portion of the medical bills without any amount for pain and suffering is erroneous and should shock the conscience of the Court. Plaintiff argues that this analysis of the jury's verdict establishes the need for a new trial. The Court does not agree and finds that there are alternative explanations for the jury's verdict. Thus, the present award is appropriate and does not shock the conscience of the Court.

(2) Plaintiff also argues that Dr. Ali Kalamchi's trial deposition clearly establishes the elements of pain and suffering and thus the jury's verdict is irreconcilable with the evidence. Plaintiff relies on *Dorsey v. Service America Corporation*¹ in which the Court could not reconcile the jury award of \$3,000.00 with the special damages and the suffering of pain and awarded an additur.

(3) The Court's standard of review on a motion for new trial is well-settled. The jury's verdict is presumed to be correct.² Barring exceptional circumstances, the Court should not set aside a jury's verdict unless it contradicts the great weight of the evidence,³

¹1997 WL 127974 (Del. Super.).

²*Mills v. Telenczak*, Del.Super., 345 A.2d 424, 426 (1975).

³*Storey v. Camper*, Del.Super., 401 A.2d 458, 465 (1979).

or the Court is convinced that the jury disregarded the applicable rules of law.⁴ Delaware courts will also order a new trial when the jury's verdict is tainted by legal error committed by the trial court during the trial.⁵

(4) Defendant Wingo argues that Plaintiff actually had three separate and distinct time periods for the injuries she allegedly sustained in the April and December 1996 accidents. They are as indicated in paragraph one above, and additionally April 7, 1996 to July 11, 1996.⁶ During trial Mr. Wingo conceded that while Plaintiff may have experienced temporary soft tissue injuries from his accident, he contested whether her injuries were permanent or resulted in the medical bills in question. In support of the argument that her injuries were only temporary, Mr. Wingo presented Plaintiff's own medical records and testimony from her own expert, Dr. Carr, who opined that her injuries from the April accident had resolved by the time he started treating her and that her physical complaints after December 4, 1996 were related to the Zervas automobile accident. Defendant Wingo argues that Ms. Clark's primary complaint during the first period of treatment centered on neck pain and during the second period was for both her

⁴*Storey v. Castner*, Del.Supr., 314 A.2d 187, 193 (1973).

⁵*e.g. DuPhilly v. Delaware Electric Cooperative, Inc.*, Del.Supr., 662 A.2d 821, 833-34 (1995).

⁶The medical bills for this time period were not presented to the jury as they were paid under title 21, section 2118 of the Delaware Code.

neck and right shoulder pain. The third period of treatment involved left shoulder complaints. Defendant Wingo reiterates that complaints of and treatment for Plaintiff's shoulder pain are almost completely non-existent during her course of treatment from April through July 1996. Defendant Wingo alleges that the jury's award clearly distinguishes between the two accidents and is not necessarily based on the aggregate of the medical bills for the latter two time periods while ignoring Plaintiff's pain and suffering from April through July 1996 as Plaintiff argues. Defendant Wingo suggests that the jury determined that Ms. Clark's injuries from the April 1996 accident were temporary and that she should be awarded \$1,000 for pain and suffering which resolved within three months after the April 1996 accident. Additionally, Mr. Wingo argues that absent the \$1,000 award against him, Plaintiff's explanation for the jury's verdict fails since it hinges on combining both awards and comparing the aggregate against the medical bills. The Court agrees, as Defendant Wingo points out, that there are alternative explanations for the jury's rationale in determining their award. Defendant Wingo also contends that Plaintiff's reliance on inapposite case law is misplaced in that the jury in the instant case did not award a sum equal to the outstanding medical bills.⁷ The amount of the award is not sufficiently identical to the combined amount of past medical expenses to allow the Court to see into the minds of the jury. Additionally, the Court finds there is no

⁷*Chorman v. Kelly*, Del. Super., No. 95C-11-212-WTQ (July 18, 1997).

evidence that the jury disregarded the applicable rules of law.

(5) Defendant Zervas agrees that the time periods under consideration were April 1996 through July 1996 and December 1996 through February 1998. Defendant Zervas contends that the testimony of Drs. Crain and Carr did little to causally connect Plaintiff's injuries with either the April or December 1996 motor vehicle accidents. Defendant raises the lack of credibility with the jury, of the Plaintiff, as well as Drs. Crain and Carr as possible reasons for the verdict rendered.

Defendant Zervas cites examples to illustrate the Plaintiff's lack of credibility with the jury. With regard to the April, 1996 motor vehicle accident, the Plaintiff testified that a knee injury from a February 1996 work related incident, was aggravated and she had some cervical or lumbar strains and sprains. Plaintiff saw Dr. Cowen of Delcare Plus on December 10, 1996 and reported to him that she was pain free at the time of the December accident and that the prior April 1996 injuries had recovered by July 1996. However, in trial she testified that the injuries she suffered in the April 1996 accident continued. Conversely, Dr. Crain testified that the Plaintiff had permanent impairment to her neck, which he attributed to the April 1996 motor vehicle accident only to a minor degree. Thus, Zervas argues, Plaintiff's testimony was in direct contradiction to her physicians and presented credibility issues for the Plaintiff as well as her physicians.

(6) With regard to the December 4, 1996 motor vehicle accident, Defendant Zervas argues further that because Plaintiff did not reveal to her physicians that she had an MRI performed in 1993 which revealed a similar disc herniation, her credibility with the jury was again lessened. Finally, with regard to the alleged loss of wages claim, Plaintiff credibility was again compromised in front of the jury because Plaintiff initially denied that a painful skin condition affecting her feet played a role in her early retirement. When confronted with her own testimony and with the notes of two physicians, Plaintiff eventually conceded that this condition was at least one factor in her retirement.

(7) Additionally, Defendant Zervas points out the conflicting testimony of Dr. Crain and Dr. Kalamchi regarding Plaintiff's shoulder problems. Dr. Crain testified that the Plaintiff suffered from a rotator cuff injury, while Dr. Kalamchi stated that her shoulder problems were simply degenerative. Zervas points out that the affects of the December 4, 1996 accident were much in dispute at trial and could have accounted for the jury's verdict and that it is simply speculation as to why the jury awarded the Plaintiff approximately \$7,000 against Mr. Zervas. Given the fact that the jury awarded the Plaintiff monies for both accidents, Defendant Zervas argues that there should be no basis for the Court to change the award. Due to the substantial dispute among the parties and the experts regarding the exact nature and extent of Plaintiff's injuries, the jury's verdict is both fair and appropriate.

(8) The Court finds that the jury verdict is supported by the weight of evidence. There is absolutely no evidence that the jury disregarded the applicable rules of law. The jury had to discern whether Plaintiff was believable as to her testimony regarding her injuries. Additionally, the jury was free to accept or reject any expert testimony and render a verdict accordingly. The jury chose to apportion the \$7,949.00 award as \$1,000.00 from Defendant Wingo and \$6,949.00 from Defendant Zervas. The amounts awarded bear a relationship to the medical evidence presented, as Plaintiff's primary medical complaints were made after the second motor vehicle accident. The amounts awarded do not shock the conscience of the Court. The Court finds the jury verdict is not against the weight of evidence, and does not warrant granting a new trial or an additur.

For the foregoing reasons Plaintiffs' Motion for New Trial is hereby **DENIED**.

IT IS SO ORDERED.

ALFORD, J.