SUPERIOR COURT

OF THE

STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

(302) 255-0664

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801

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Re: **Allen R. Smith and Sarah J. Smith v. James A. Lawson, IV and Lynda B. Tyndall v. Allstate Insurance Company**
C.A. No. 01C-12-105 RRC

Submitted: November 3, 2005
Decided: January 23, 2006

On Defendant James A. Lawson, IV's
Amended Motion for New Trial.
DENIED.

On Plaintiffs Allen R. Smith and Sarah J. Smith's Motion for New Trial on the Issue of Damages Only, or, in the Alternative, for Additur.
MOTION FOR NEW TRIAL ON THE ISSUE OF DAMAGES ONLY GRANTED.

On Plaintiffs Allen R. Smith and Sarah J. Smith's
Motion for Costs.
GRANTED IN PART, DENIED IN PART.

Dear Counsel:

Currently before this Court are three motions that arose after the conclusion of the jury trial in November 2004. As to Defendant/Third-Party Plaintiff James A. Lawson, IV's ("Lawson") Amended Motion for New Trial, that motion is denied because (1) the jury's alleged inconsistent answers to verdict form interrogatories can be reconciled with the evidence at trial, and (2) then-trooper Conklin's ("Conklin")[1] testimony regarding the cause of the accident was correctly excluded as inadmissible lay opinion. As to Plaintiffs Allen R. Smith and Sarah J. Smith's ("Smiths") Motion for New Trial on the issue of damages only, or alternatively, for additur, that motion for new trial on damages only is granted on the grounds that (1) the jury verdict was inadequate fully to compensate the Smiths, and (2) the issue of liability is sufficiently distinct from the issue of damages to allow a new trial on damages alone. Finally, the Smiths' Motion for Costs is granted in part only as to those costs that are conceded by Defendant Lawson and denied in part without prejudice to its later possible renewal until the resolution of the new trial on damages only.

I. FACTS

This case arises from an automobile accident that occurred on January 7, 2001, in which Plaintiff Allen Smith sustained significant injuries that resulted in numerous surgeries on his knees and left wrist. The Smiths alleged in the Complaint that the Defendant/Third-Party Plaintiff Lawson negligently struck Allen Smith near Route 273 and Red Mill Road, in Newark. At the time of the accident, Smith was attempting to direct traffic around two stopped vehicles owned by Allen Smith and Defendant/Third-Party Plaintiff Lynda B. Tyndall ("Tyndall"). Earlier, Allen Smith had observed Tyndall driving erratically and decided to follow her; in fact, Tyndall was driving under the influence.[2] Both Tyndall and the Smiths (Sarah Smith was also in the car at the time) were traveling westbound on Route 273 when Tyndall appeared to be turning left onto Ogletown Road, which intersects with Route 273. However, instead of exiting Route 273, Tyndall veered back onto the two lanes of the highway heading eastbound,

[1] Conklin, who had been a Delaware State Trooper at the time of the accident, subsequently became an FBI Agent.

[2] Tyndall later entered the First Offender's Program for Driving Under the Influence.

against oncoming traffic. In reaction to Tyndall's driving, Allen Smith attempted to pull her over himself: he sped up and cut across the grass median that divided the two-lane highway and intercepted Tyndall's car by cutting in front of her. This forced Tyndall to stop her vehicle in the left-hand lane of Route 273 eastbound. Tyndall remained in her car thereafter. After the stop, both vehicles were on the wrong side of the highway, facing oncoming traffic, and remained so throughout the incident.

After succeeding in stopping Tyndall's vehicle, Smith got out of his car and positioned himself in front of his vehicle to direct traffic away from the parked vehicles. Then, because of his position on or near the highway,[3] Allen Smith was struck and injured by the vehicle driven by Lawson. Approximately one to two minutes elapsed between the time that Allen Smith stopped Tyndall's vehicle and the moment Lawson collided with Allen Smith.

The Smiths sought damages for past medical expenses in the amount of $74,900, and lost wages of $74,750; these damages were undisputed at trial.[4] The Smiths sought general damages for pain and suffering as well. Allen Smith's wife, Sarah, also filed a claim for loss of consortium. Third-Party Defendant Allstate Insurance Company ("Allstate") was later added to this action by Lawson because at the time of the accident Allen Smith was operating a vehicle insured by Allstate. The insurance policy contained uninsured motorist coverage, as required by law. At the time of the accident, Tyndall did not carry automobile insurance, thus necessitating the addition of Allstate.

At the close of the evidence, all three defendants – Lawson, Tyndall and Allstate – moved for a judgment as a matter of law. The Court denied Lawson's motion, but reserved decision on both Tyndall's and Allstate's respective motions. After six hours of deliberation, the jury awarded the Smiths $135,000 in damages ($125,000 to Allen and $10,000 to Sarah on her consortium claim (despite the fact that past medical expenses and lost wages claims of Allen Smith totaling $149,650 were not contested)) and apportioned liability 50% to Allan Smith and 50% to Lawson; the jury

[3] Allen Smith's exact position in the highway was in dispute at the trial.
[4] Pls. Mot. for New Trial, D.I. 96, at 2, 3.

ascribed no liability to Tyndall.[5] After the jury verdict, the Court determined that the pending motions of Tyndall and Allstate for judgment as a matter of law were moot, based on the jury's assessment of zero liability to Tyndall.

II. CONTENTIONS OF THE PARTIES

A. Lawson's Amended Motion for a New Trial.

Lawson sets forth two bases in support of the grant of a new trial. First, Lawson argues that the jury's responses to verdict form interrogatories indicate that the jury misunderstood the law regarding proximate cause and superseding cause, thus rendering the jury's responses inconsistent. Second, Lawson asserts that the exclusion of then-trooper Conklin's testimony was error because the Smiths had waived the right to object by not doing so in a deposition.

As to the first basis, the Smiths respond that Lawson failed to object to the jury interrogatories at the trial and that any objection was thus waived by Lawson.[6] In any event, the Smiths argue, the jury's responses and verdict can be easily reconciled with the evidence submitted at trial. As to the second basis, the Smiths argue, as to the exclusion of then-trooper Conklin's

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[5] Jury Verdict Form, D.I. 95 (after finding that both Lawson's and Tyndall's negligence was a proximate cause of Allen Smith's injuries and that Allen Smith was contributorily negligent, the jury found that either Lawson's or Allen Smith's negligence was a superseding cause of Allen Smith's injuries).

[6] Prior to trial, on September 7, 2004, Allstate had submitted a "Motion in Limine to Exclude Evidence of Alcohol Evidence of Any Charges and Allow Argument of Comparative Negligence and Superceding [sic] Negligence." D.I. 78. Only one line of the motion was dedicated to the superseding cause issue: "Defendant Allstate submits that under the circumstances of this accident it should be allowed … to argue superceding [sic] negligence of James Lawson and Allen Smith."

On October 7, 2004, Plaintiffs filed a Response, D.I. 81, to Allstate's motion, which was joined that same day by Lawson via a letter to the Court from Lawson's counsel. The response focused mainly on the admissibility of the evidence of Tyndall's alcohol consumption and guilty plea. In fact, the only reference to superseding cause in the papers opposing Allstate's Motion in Limine is in a proposed order that was attached to Lawson's counsel's October 7 letter. The proposed order, in pertinent part, said, "Third-party defendant shall not have available the argument of superceding [sic] negligence on the part of defendant, James Lawson."

Lawson concedes that no objection was made during trial to the inclusion of the superseding cause instruction that was ultimately given to the jury.

testimony, that they never waived the right to object because the alleged "waiver" was made in a deposition, where the failure to object to testimony on relevancy or materiality grounds does not constitute a waiver. Further, the Smiths rely in part on *Lagola v. Thomas*,[7] a case decided by the Delaware Supreme Court subsequent to the trial, to show that the pertinent portion of then-trooper Conklin's testimony was inadmissible and was properly excluded.

B. Plaintiffs' Motion for a New Trial on Damages Only.

In support of Plaintiffs' Motion for New Trial on the issue of damages only, or alternatively, for additur, the Smiths argue that the jury verdict was inadequate fully to compensate them because the award was less than the amount of the unrebutted special damages that had been set forth by the Smiths at trial. The Smiths heavily rely on *Christiana School District v. Reuling*,[8] which in essence held that a jury award less than the amount of proven, unrebutted special damages is inadequate. Thus, because Lawson did not rebut the Smiths' evidence of special damages, any award that is less than the amount of such unrebutted special damages is inadequate.[9] It is unknown whether the jury's verdict included any award for pain and suffering.

Lawson responds that the jury verdict should not be disturbed by this Court because it does not "shock the conscience." Lawson also argues that a new trial on damages alone should be granted only when the issue of liability and the issue of damages are severable. In this case, contends Lawson, "the liability issue is so inexorably intertwined with the plaintiff's claimed injuries that to sever the issues would cause great prejudice to the defendant."[10]

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[7] 867 A.2d 891 (Del. 2005).

[8] 1990 WL 72598 (Del. Supr.).

[9] In light of the lack of dispute of the nature of Allen Smith's injuries, which are set forth thoroughly in Plaintiffs' Motion for New Trial at ¶¶ 3-6, they will not be restated here.

[10] Def. Lawson's Opp., D.I. 98, ¶ 7.

C. Plaintiffs' Motion for Costs.

The Smiths seek costs in the form of court costs of $625 and expert witness fees of $5,645.98, totaling $6,270.98, which the Smiths claim are reasonable costs in pursuing the claims to trial. The Smiths' expert witness fees are broken down here:

Sherkey & Associates	$1,837.00
Brian Galinat, M.D.	$1,500.00
Deposition Transcript (Galinat)	$347.65
Peter Townsend, M.D.	$1,500.00
Deposition Transcript (Townsend)	$278.58
Kevin Conklin (Deposition)	$182.75

Lawson concedes that the $625 in court costs is recoverable upon their itemization by the Smiths, which was subsequently done in the Smiths' Reply. However, Lawson argues that the expert fees for Dr. Galinat and Dr. Townsend lack substantiation and should at the very least be reduced from the $1500 figure, if not denied altogether. Likewise, as to the Sherkey & Associates fees, Lawson concedes that it is liable for only $460 plus a reasonable charge for travel time. Lawson further argues that he should not be taxed for the alleged transcript fees because Lawson maintains that the Court moved them into evidence, and not the Smiths, who are seeking the costs. Finally, Lawson objects to the cost of Conklin's testimony because he contends that the transcript was necessary only because counsel for the Smiths was not present at that portion of the proceeding on his own accord.

IV. DISCUSSION

A. Plaintiffs' and Defendant's Motions for New Trial.

Superior Court Civil Rule 59(a) provides that a "new trial may be granted as to any or all 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."[11] Thus, this Court must look to prior case law to reach a decision.

[11] Super. Ct. Civ. R. 59(a).

Every analysis of a motion for a new trial must begin with the presumption that the jury verdict is correct.[12] The jury's verdict should not be set aside unless it is against the great weight of the evidence or the verdict shocks the Court's conscience.[13] Otherwise stated, a jury verdict may be overturned if the Court is convinced that the jury disregarded the applicable rules of law.[14]

1. Lawson's Motion for a New Trial.

a. The jury interrogatories were legally sufficient.

As to the first basis for Lawson's Motion for New Trial, the issue is whether the jury's answers to the verdict form interrogatories are consistent and can be reconciled with the evidence presented at trial.

Under Delaware law, a jury's verdict will be set aside where the jury's answers to special verdict form interrogatories are alleged to be inconsistent, unless there is a rational basis on which to maintain the jury verdict.[15] "The jury's verdict will stand as long as the Court finds one possible method of construing the jury's answers as consistent with one another and with the general verdict."[16]

Here, the jury's verdict is readily reconcilable with the evidence presented at trial. The jury answered that Tyndall's negligence was a proximate cause of Allen Smith's injuries. The jury also found that the

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

[13] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979); *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973).

[14] *Castner*, at 193.

[15] *Citisteel USA, Inc. v. Connell Ltd. P'ship*, 1998 WL 309801, * 4 (Del. Supr.) (finding no rational basis on which to support the jury's verdict where the jury gave two "diametrically opposed" answers, one that said that defendant breached an oral agreement and the other that said that defendant was liable for failing to sign the written agreement) (citing *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962)); *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 832-33 (Del. 1995) (finding plain error where the trial court let stand the jury verdict even though it ran "afoul" of the trial court's instruction on superseding cause, which allowed a finding of only one proximate cause, where the jury found that one defendant's negligence was, as the superseding cause, the sole proximate cause of plaintiff's injuries, yet finding that another defendant's negligence was also a proximate cause of plaintiff's injuries).

[16] *Citisteel*, at *4 (internal citations omitted).

negligence of both Lawson and Allen Smith were both proximate causes as well as superseding causes of Allen Smith's injuries. These findings are consistent with the evidence that suggests that Tyndall's negligence had ended as soon as Allen Smith succeeded in stopping Tyndall's vehicle. Moreover, the jury's apportionment of liability among the responsible parties indicates that the jury understood and correctly applied the law regarding proximate cause and superseding cause. This Court finds that the jury's finding that Tyndall is shielded by the superseding cause (Allen Smith's undertaking) can be reconciled with the evidence presented at trial.

Lawson primarily relies on *Duphily v. Delaware Electrical Cooperative, Inc.* which held that it was plain error for the trial court to uphold a jury verdict that was contrary to the jury instructions.[17] Lawson argues that the jury misunderstood the law, thus rendering the jury's responses to the verdict interrogatories inconsistent. Such "confusion" over the interrogatories, Lawson asserts, substantially affected his right to a fair trial, thus requiring a new trial. The *Duphily* Court held that the jury's interrogatory answers finding two proximate causes, contrary to the jury instructions, undermined the jury's ability to carry out its duty and affected the substantial rights of the parties, thus, necessitating a new trial.[18] Both *Duphily* and the instant case involve jury verdicts that found that the original tortfeasor was negligent and a proximate cause of the plaintiff's injuries yet also found that a second tortfeasor was a superseding and proximate cause and, thus, solely liable for plaintiff's injuries. However, the similarities of the two cases as to that issue end there. The key distinguishing factor is that the *Duphily* trial court instructed the jury that if the negligence of the second tortfeasor was a superseding cause (i.e., unforeseeable), then the negligence of the original tortfeasor could not be a proximate cause of the plaintiff's injuries; the instructions given here did not so limit the jury.[19]

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[17] 662 A.2d 821, 834 (Del. 1995).

[18] *Id.* at 832 (explaining that the plaintiff objected to references to superseding cause in the jury instructions and interrogatories, but not to the form of the jury interrogatories, which was one of the bases argued for a new trial).

[19] The jury instruction on superseding cause here allowed the jury to find more than one proximate cause of plaintiff's injuries; however, if the jury also found that Allen Smith's or Lawson's negligence was a superseding cause (i.e., that it was unforeseeable), then the original proximate cause, that of Tyndall, could not be found to be responsible for Allen Smith's injuries. The *Duphily* court did not give an instruction allowing the jury that latitude.

In this case, the circumstances that warranted a new trial in *Duphily* are not present and therefore, Lawson's reliance on *Duphily* is misplaced. Importantly, unlike in *Duphily*, at no time during trial or at the prayer conference did Lawson object to either the instruction given on superseding cause or the jury interrogatories in the verdict form.[20] In *Duphily*, the plaintiff "objected to any reference to superseding causation in the jury instructions and interrogatories, [but] he did not object to the form of the interrogatories."[21] Also, as stated above, the jury instruction here is different than that in *Duphily* and allows for a finding of more than one proximate cause notwithstanding the fact that the second cause superseded the first. The jury instruction on superseding cause given in this case stated, in pertinent part:

> One cause of injury may come after an earlier cause of injury. The second is called an intervening cause. The fact that an intervening cause occurs does not automatically break the chain of causation arising from the original cause. There may be more than one proximate cause of an injury. In order to break the original chain of causation, the intervening cause must also be a superseding cause, that is, the intervening act or event itself must not have been anticipated nor reasonably foreseen by the person causing the original injury. An intervening act of negligence will relieve the person who originally committed negligence from liability:
>
> (1) if at the time of the original negligence, the person who committed it would not reasonably have realized that another's negligence might cause harm; or,
> (2) if a reasonable person would consider the occurrence of the intervening act as highly extraordinary; or,
> (3) if the intervening act was extraordinarily negligent.
>
> If Allen Smith's or James Lawson's negligence, coming after Linda Tyndall's negligence was a distinct and unrelated cause of the injuries, and if that negligence could not have been reasonably anticipated, then you may find Allen Smith's or James Lawson's negligence to be the sole proximate cause of the injuries. If you so find, you must return a verdict in favor of Defendant Linda Tyndall and Third Party Defendant Allstate.

Interrogatory #2 on the verdict form asked the jury to determine whether Linda Tyndall's negligence was a proximate cause of Allen Smith's injuries. Interrogatory #4 asked the jury, in part: do you find that the

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[20] Def. Lawson's Amended Mot. for New Trial, D.I. 109, ¶ 8.
[21] 662 A.2d at 832.

negligence of James Lawson or Allen Smith was a superseding cause? The jury answered in the affirmative to both questions. Perhaps interrogatory #2 was, in retrospect, not well worded "because it referred to [Tyndall's negligence as a] proximate cause of injury rather than proximate cause of the accident…"[22] However, the jury verdict, which relieved Tyndall of liability because of Allen Smith's and/or Lawson's superseding cause(s) regardless of finding that Tyndall was negligent, can, without difficulty, be reconciled with the evidence presented at trial. A span of one or two minutes existed between Allen Smith's successful stop of Tyndall's car and the impact between Smith and Lawson's vehicle. As demonstrated by the jury's verdict, that one to two minute time period after Tyndall's car was stopped was more than sufficient effectively to end Tyndall's negligence before Lawson came onto the scene. This Court finds that the jury understood each interrogatory and how the finding that either Lawson's or Allen Smith's negligence was a superseding cause affected Tyndall's liability. The bottom line is that the jury understood that the unusual actions of Allen Smith were a superseding cause. Thus, the jury concluded that Tyndall's negligence had ended, a conclusion with which this Court agrees as a matter of law. A new trial on this basis as to liability is not warranted.

b. Conklin's deposition testimony was properly excluded.

The remaining issue in this motion is whether a new trial is warranted based on this Court's exclusion of Conklin's testimony concerning the circumstances and the cause of the accident. Lawson is entitled to a new trial only if the evidence was improperly excluded and such exclusion was significantly prejudicial.[23]

The admissibility of Conklin's testimony is governed by Delaware Rule of Evidence 701, which states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the

[22] Def. Allstate's Resp. to Lawson's Mot. for New Trial, D.I. 101, ¶ 7.

[23] *See Devaney v. Nationwide Mut. Ins. Co.*, 679 A.2d 71, 74-75 (Del. 1996) (holding that the erroneous exclusion of certain evidence by the trial court was significantly prejudicial to the plaintiff and necessitated a new trial).

> determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.[24]

"A lay witness may only express an opinion when the perception of the witness cannot be communicated accurately and fully without expressing it in terms of an opinion …"[25] Otherwise, any opinion from a lay person, as opposed to an expert, that does not fall within the strictures of DRE 701 is inadmissible.

The Delaware Supreme Court's recent decision in *Lagola* controls the admissibility of Conklin's testimony regarding the circumstances of the accident.[26] In *Lagola*, a personal injury trial involving an automobile accident, the trial court allowed the police officer who investigated the accident to testify as to the "primary contributing circumstance" of the accident.[27] Over the objection of defense counsel, the police officer testified that in his report he indicated that the "primary contributing circumstance" was that the defendant's car was traveling "too fast" at the time of the accident.[28] The Supreme Court found that the testimony regarding the "primary contributing circumstance" constituted lay opinion because it was not based on facts as the officer had perceived them in his investigation of the accident.[29] Thus, the Court concluded that the testimony was inadmissible because the officer had not been qualified as an expert in accident reconstruction and, thus, could not testify as to his opinion.[30]

This case is very similar to the *Lagola* case in that one party attempted to introduce the testimony of the investigating officer concerning the cause of the accident, which, in effect, attributed liability to another party. As in *Lagola*, the party here – Lawson – did not qualify his witness – Conklin – as an expert in accident reconstruction. Therefore, any testimony not based on

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[24] Delaware Rule of Evidence 701.

[25] *Lagola v. Thomas*, 867 A.2d at 896 (quoting *Seward v. State*, 723 A.2d 365, 372 (Del. 1999)).

[26] 867 A.2d 891 (reversing the Superior Court's denial of defendant's motion for a new trial because the trial court's admission of the police officer's testimony regarding the 'primary contributing circumstance' of the accident endangered the fairness of the trial).

[27] *Id.* at 893-94 (concluding that there is little difference between "primary cause" and "primary contributing circumstance").

[28] *Id.* at 894.

[29] *Id.* at 896.

[30] *Id.* at 896-97.

Conklin's own perception of the facts is inadmissible lay opinion. The evidence was correctly excluded at trial and thus, a new trial is not warranted on that ground.[31]

2. The Smiths' Motion for a New Trial as to Damages Only, or Alternatively, for Additur.

The first issue is whether the jury verdict is inadequate as to warrant a new trial where the jury awarded an amount less than the sum of unrebutted special damages – lost wages and medical expenses – submitted by the Smiths. If the answer to that question is yes (and the Court concludes that this question must be answered in the affirmative), then the second issue becomes whether the issue of damages is sufficiently severable from the issue of liability as to allow a new trial on damages only.

i. The jury verdict was inadequate to compensate the Smiths for their injuries and a new trial is necessary.

A jury verdict may be set aside and a new trial ordered if the amount of damages awarded by the jury is inadequate to compensate the Smiths for the injuries they sustained and proved at trial.[32]

The Smiths primarily rely on *Christiana School District v. Reuling* to argue that the jury verdict was inadequate to compensate them for their injuries.[33] In *Reuling*, the Supreme Court affirmed the Superior Court's decision to enter a partial directed verdict on behalf of the plaintiffs where the defendant offered no evidence to counter plaintiff's evidence that showed that plaintiff's surgery was caused by the accident.[34] That holding

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[31] As a result of the denial of Lawson's Motion for New Trial, Tyndall's and Allstate's motions for judgment as a matter of law that were submitted orally at trial and deferred by the Court remain moot. The jury's verdict stands as relieving Tyndall and Allstate of liability for Plaintiffs' injuries.

[32] *See Mikkelborg v. Gonzalez*, 2003 WL 1410030 (Del. Super.) (granting plaintiff's motion for new trial because of the inadequacy of a $0 jury verdict where there was uncontroverted evidence that plaintiff suffered an injury to his knee because of the negligence of the defendant); *Di Gioia v. Schetrompf*, 251 A.2d 569 (Del. Super. 1969) (granting plaintiff husband's motion for a new trial where award was inadequate as a matter of law because no damages were given for pain and suffering even though they had been proven at trial).

[33] 1990 WL 72598 (Del. Supr.).

[34] *Id.* at *3.

was later re-emphasized by the Supreme Court in *Patterson v. Coffin*: "[i]n *Christiana School District v. Reuling*, we held that when a plaintiff presents uncontroverted medical expert opinion regarding causation of injuries, a jury is required to award past lost wages and past medical expenses."[35]

The holding in *Reuling* is applicable to the present facts. Here, the Smiths presented uncontroverted damages of $74,900 in the form of medical expenses and roughly $74,750 in the form of lost wages.[36] The total of these uncontroverted special damages was about $149,650; however, the jury inexplicably awarded Allen Smith only $125,000 (and $10,000 to his wife on her consortium claim). The verdict was reduced by 50% to reflect the jury's comparative apportionment of liability among the responsible parties.[37] Under *Reuling*, Allen Smith is entitled to $149,650 (before, however, reduction by 50%), which is the amount demonstrated by the uncontroverted testimony. Thus, the jury verdict, which amounted to less than the uncontroverted evidence from the Smiths showed, was inadequate to compensate the Smiths. The jury award was "manifestly the result of disregard [sic] of the evidence or applicable rules of law."[38] Thus, the jury's verdict cannot be allowed to stand.

ii. The Issue of Damages Is Severable From the Issue of Liability and, Thus, a Trial on Damages Alone is Appropriate.

The second issue raised by the Smiths' motion is whether the issue of liability is sufficiently severable from the issue of damages as to require a new trial on damages only.

As set forth in Rule 59(a), a new trial may be had on only "part of the issues."[39] The purpose behind this rule is to avoid the retrial of issues that

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[35] 2004 WL 1656514, *1 (Del. Supr.) (distinguishing *Reuling* because the defendants there did present expert testimony that controverted the plaintiff's expert testimony and finding that the evidence admitted at trial preponderated, thus, not requiring a new trial).

[36] Pls. Mot. for New Trial, D.I. 96, at 2, 3.

[37] *Id.*, at 3,4; Def. Lawson's Opp., D.I. 98, ¶ 2.

[38] *Castner*, 314 A.2d, at 193.

[39] Super. Ct. Civ. R. 59(a).

were properly and fully decided during the original trial.[40] Where the issue of liability is distinct from the damages issue, the court may grant a new trial as to the issue of damages only.[41] Specifically, a new trial on the issue of damages alone is appropriate where the issue of liability was effectively determined by the jury.[42] One commentator has said that "[t]he trend of the courts appears to be toward adopting the view that in cases involving inadequacy of damages, the directing of limited or partial retrials is generally favored, except where such a procedure results in injustice."[43]

A recent Delaware case has held that the issue of liability is clearly separate from the issue of damages where the jury is instructed not to reduce the ultimate award by the percentage of fault that the jury comparatively attributes to the plaintiff.[44] Here, the Court instructed the jury to "not reduce your award by the amount of Mr. Smith's negligence, if you found him to be negligent." This ensured that the jury would compensate the Smiths based on the injuries sustained, not based on their comparative negligence. That instruction was given to keep the issue of liability separate and apart from the ultimate issue of damages, and thus, a new trial on damages alone is appropriate. Although Allen Smith's comparative negligence, or lack thereof, was hotly contested at trial, and while the jury might have as easily determined that Allen Smith was 51% negligent, thus barring any recovery,

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[40] *Larrimore v. Homeopathic Hosp. Ass'n*, 176 A.2d 362, 371 (Super. Ct. 1961) (granting a new trial on damages only based largely on the fact that the liability issue had been reasonably determined by the jury).

[41] *Coldiron v. Gaster*, 278 A.2d 328, 334 n.4 (Del. Super. 1971), *modified* and *aff'd*, 297 A.2d 384 (Del. 1972) (citing *Burns v. Delaware Coca-Cola Bottling Co.*, 224 A.2d 255 (Del. Super. 1966) (granting a new trial on damages alone in a case involving personal injury suffered upon the discovery of a foreign substance in a bottle of soda where the jury was instructed to determine damages only after liability had been established)).

[42] *Larrimore*, at 371.

[43] Randy R. Koenders, Annotation, *Propriety of Limiting to Issue of Damages Alone New Trial Granted on Ground of Inadequacy of Damages – Modern Cases*, 5 A.L.R. 5th 875 (1992) (recognizing the authority of a trial court to exercise its discretion in granting a new trial on the issue of damages only and providing a myriad of cases that demonstrate the subtleties involved in the decisions).

[44] *See Johnson v. Carney's Contracting Co., et al.,* 1998 WL 732893, * 2 (Del. Super.) (granting an additur, but indicating that should defendant refuse the additur, a new trial would be limited to the issue of damages, where the jury award was inadequate to compensate the plaintiff).

Lawson has not otherwise shown how liability was "inexorably intertwined"[45] with damages.[46]

B. Plaintiffs' Smiths Motion For Costs.

Some of the costs prayed for by the Smiths were conceded by Defendant Lawson in the papers. Those costs included the $625 in court costs. Therefore, this Court awards $625 in court costs to Plaintiffs.

However, certain other costs remain at issue. These remaining disputed costs include the expert fees of Dr. Galinat and Dr. Townsend, the fees associated with Sherkey and Associates, the costs of then-Trooper Conklin's deposition, and the transcript fees. As to these remaining disputed costs, this Court denies that part of Plaintiffs' Motion for Costs without prejudice for later renewal after the conclusion of the new trial on damages alone.

V. CONCLUSION

In light of the foregoing, Defendant Lawon's Amended Motion for a New Trial is **DENIED**; Plaintiffs' Smiths Motion for a New Trial on the issue of damages only is **GRANTED**; and Plaintiffs' Smiths Motion for Costs is **GRANTED IN PART** and **DENIED IN PART**.

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary
cc: Curtis P. Bounds, Esquire (Receiver for David S. Shamers, Esquire)[47]
Michael A. Pedicone, Esquire

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[45] Def. Lawson's Opp., D.I. 98, ¶ 7.

[46] Having granted Plaintiffs' Motion for New Trial on damages only, the Court does not reach Plaintiff's "alternative" request for additur.

[47] Mr. Shamers, trial counsel for Tyndall, was suspended from the practice of law in an opinion issued by the Delaware Supreme Court on May 20, 2005. *In re Shamers*, 873 A.2d 1089 (Del. 2005).