STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: JANUARY 26, 2012)

DONNA ROSE	:	
	:	
VS.	:	
	:	**C.A. NO. 06-0650**
CHRISTOPHER CARIELLO and	:	
JAMES CARIELLO	:	

DECISION

STERN, J. Before this Court is the motion for additur and/or new trial of Plaintiff Donna Rose. Jurisdiction is pursuant to Superior Court Rule of Civil Procedure 59.

I.

FACTS AND TRAVEL

On September 30, 2003 at approximately 11:00 a.m., Donna Rose ("Donna" or "Plaintiff") was driving her 1984 Dodge motor vehicle on Route 95 South in the vicinity of Exit 19 in Providence, Rhode Island. The defendant, Christopher Cariello ("Christopher" or "Defendant"), was driving his father James's 1987 Ford in the same area. Donna slowed her vehicle and stopped in medium traffic conditions. Christopher was traveling behind Donna and his vehicle rear-ended Donna's vehicle. It is disputed by the parties in which lane and at what speeds the accidents occurred. As the result of this incident, Donna claims that she sustained personal injuries and pain and suffering; incurred medical, hospital and pharmaceutical bills; lost earning and earning capacity; and lost enjoyment of life.

At trial, the jury returned a verdict for the Plaintiff and awarded damages suffered by Plaintiff resulting from the automobile accident totaling $193,584. Furthermore, the jury found that Plaintiff was comparatively negligent in the amount of twenty-five percent (25%).

II.

MOTION FOR NEW TRIAL AND/OR ADDITUR

Rule 59 of the Superior Court Rules of Civil Procedure provides, in pertinent part, that

> A new trial may be granted to all or any of the parties and on all or part of the issues for error of law occurring at the trial or for any of the reasons for which new trials have heretofore been granted in the courts of this state.

Super. R. Civ. P. Rule 59. In deciding a motion for a new trial, the role of the trial justice is well established. In ruling on a motion for new trial, the trial justice acts as a super juror and must "independently weigh, evaluate, and assess the credibility of the trial witnesses and evidence." Morrocco v. Piccardi, 713 A.2d 250, 253 (R.I. 1998) (per curiam). In doing so, the trial justice may "accept some or all of the evidence as having probative force." Barbato v. Epstein, 97 R.I. 191, 193, 196 A.2d 836, 837 (1964). Moreover, he or she may reject parts of testimony because it is "impeached or contradicted by other positive testimony or by circumstantial evidence" or because it is "totally at variance with undisputed physical facts or laws," or even on account of "inherent improbabilities or contradictions." Id. The trial justice also may add to the evidence by drawing appropriate inferences. Id. at 193-94, 196 A.2d at 837. Furthermore, the trial justice should not substitute his or her conclusions for those of the jury or disturb the jury's findings purely because he or she would have reached a contrary finding on the same evidence. Turgeon v. Davis, 120 R.I. 586, 590, 388 A.2d 1172, 1174 (1978). While the trial justice does not need to perform an exhaustive analysis of the evidence, he or she should refer with some specificity to the facts upon which he or she based the decision. Reccko v. Criss Cadillac Co., Inc., 610 A.2d 542, 545 (R.I. 1992). If the trial justice concludes "that the evidence is evenly balanced or is such that reasonable minds, in considering the same evidence, could come to different

conclusions," then he or she should let the verdict stand. Morrocco, 713 A.2d at 253. If, however, the trial justice determines that the jury's verdict is against the fair preponderance of the evidence or fails to administer substantial justice, he or she must grant the motion for new trial. Soares v. Ann and Hope of R.I., Inc., 637 A.2d 339, 348 (R.I. 1994).

When a motion for a new trial is based on the grounds that the verdict contravenes the law, the only question presented is whether or not the jury accepted and followed the law as given to it by the trial justice in his or her instructions. Sneddon v. Costa, 117 R.I. 624, 627, 369 A.2d 643, 645 (1977). On such an allegation, the verdict should be set aside if it "is contrary to the law as given by the trial justice to the jury. . . ." Blume v. Shepard Co., 108 R.I. 683, 690, 278 A.2d 848, 852 (1971).

Concerning a jury's damage award, it is well established that "a damage award may be disregarded by the trial justice . . . if the award shocks the conscience or indicates that the jury was influenced by passion or prejudice or if the award demonstrates that the jury proceeded from a clearly erroneous basis in assessing the fair amount of compensation to which a party is entitled." Shayer v. Bohan, 708 A.2d 158, 165 (R.I. 1998) (quoting Hayhurst v. LaFlamme, 441 A.2d 544, 547 (R.I. 1982)). The mechanism by which a trial justice may increase a jury's award of damages is called additur. 2 Rhode Island Practice & Procedure § 1165 at 300 (1996). Although a motion for additur pre-dates the Rules of Civil Procedure, a party may properly bring a motion for additur pursuant to Super. R. Civ. P. 59. Id. at 299-300. In Roberts v. Kettelle, 116 R.I. 283, 301-02, 356 A.2d 207, 218 (1976), our Supreme Court recognized that the language of Rule 59 contemplates a motion for additur, and that the standard in ruling on a motion for a new trial based upon the inadequacy of damages is essentially the same as ruling on a motion for a new trial generally. A trial justice may utilize additur to correct a jury award that "fails to

properly respond to the merits of the controversy," "fails to administer substantial justice," or that is based upon an incorrect quantification of a party's comparative fault. Cotrona v. Johnson & Wales College, 501 A.2d 728, 733-34 (R.I. 1985). "If the trial justice finds that a new trial is warranted on the question of damages, it is his duty, before ordering a new trial thereon, to give the plaintiff an opportunity to file a remittitur or the defendant an additur." Roberts, 116 R.I. at 301-02, 356 A.2d at 218 (citing 1 Kent, R.I. Civ. Prac. s 59.4 (1969)).

III.

REVIEW OF THE EVIDENCE

Before this Court's examination of the evidence and the credibility of the witnesses, it should be noted that this trial took place eight years after the accident occurred. The passage of time can work memory as a river works stone. With that in mind, the Defendants never contested that the collision was a rear-end motor vehicle accident. Accordingly, the jury found Christopher negligent and concluded that Defendant's negligence was the proximate cause of the collision in this matter. At issue was the role of the plaintiff in contributing to the occurrence of the accident.

On September 30, 2003. at approximately 11:00 a.m., Donna was travelling on Route 95 South in the vicinity of Exit 19 in Providence, Rhode Island. Donna testified that she was driving in the second lane from the left, which is the lane adjacent to the high-speed lane, and that the accident occurred after she slowed her vehicle to change lanes in order to adjust to traffic conditions. The Defendant, Christopher, testified that the impact occurred in the far right lane of Route 95 South. The responding Rhode Island State Police Trooper Liu also indicated in his testimony that Christopher's vehicle struck Donna's vehicle in the right lane. This Court notes the discrepancy in the testimonies regarding the lanes, but is inclined to believe that this resulted

from the lengthy span of time between the day of the accident and the trial. Furthermore, there might have been confusion in the witnesses' recollection regarding a nearby exit lane and whether or not to count this as a travelling lane. Nevertheless, this Court does not find that the lane issue is dispositive when gauging Donna's credibility and therefore deems her testimony credible. Regarding the speed at which the accident occurred, Donna indicated that she did not see the Defendant's vehicle before the impact and that she therefore was unable to comment upon his vehicle's speed at impact. Christopher testified that his speed was ten (10) miles per hour at impact. State Trooper Liu stated that the impact was a low-speed impact. This Court finds that the evidence presented at trial regarding the details of the accident is consistent with the jury's determination that Donna's changing of lanes at a slow speed merited a twenty-five percent (25%) apportionment of negligence. Further, this Court finds that such an apportionment is a fair, reasonable and acceptable response to the evidence against Donna. Thus, this apportionment is not against the fair preponderance of the evidence and is an assessment upon which reasonable minds could differ. Therefore, the apportionment of contributory negligence will not be disturbed.

As to the motion for new trial as it relates to the adequacy of the jury's damage award, this Court has reviewed the extensive medical records and bills which were full exhibits for the jury's consideration as well as the transcripts from the expert witness testimony presented at trial. The Plaintiff underwent two surgical procedures on her lumbar spine after the date of the accident; the first on April 22, 2005 and the second March 13, 2008. At issue was whether these two surgeries were causally related to the automobile accident. Both sides presented expert medical testimony. Dr. Edward Feldmann, a neurologist, testified for the Plaintiff, Donna. Dr. Thomas Morgan, also a neurologist, testified for the Defendants. Both experts agreed that the

Plaintiff had significant pre-existing degenerative disc disease. They also agreed that the MRI testing performed upon the Plaintiff on November 25, 2003, March 24, 2005 and November 23, 2007, showed that the Plaintiff's pre-existing condition was worsening due to the passage of time, and that by November 23, 2007, there were new positive findings not present on the first MRI performed on November 25, 2003. Dr. Feldmann, a highly qualified, board certified neurologist, testified that the injuries Donna sustained in the accident were more severe than mild soft-tissue injuries. He testified that Donna had no history of lower backpain before the accident and that she developed pain after the accident. Furthermore, he explained that degenerative disc disease is often asymptomatic. He opined that Donna's injuries involved radiculopathy, which is disc and nerve root injury and that this condition is the cause of the pain Donna experiences. He further testified that he believes to a reasonable degree of medical certainty that the accident on September 30, 2003 caused these severe injuries that have resulted in Donna experiencing these pains permanently.

Dr. Morgan, also a highly qualified, board certified neurologist, disagreed with Dr. Feldmann's findings. He opined that Dr. Feldmann's review omits Donna's police and EMS report from September 30, 2003, that describes the injury as neck pain and not low back pain with right sciatica. His report states that she suffered soft-tissue neck strain as a result of the minor rear-end motor vehicle collision. According to Dr. Morgan, soft-tissue injuries are mild and the healing time for these conditions range from a few days to a few weeks and are not associated with any permanent injury or impairment. Furthermore, lumbar spine x-rays on October 27, 2003, revealed L5-S1 sclerosis and spurs at the L5-S1 endplate and moderate spondylosis deformans at L4-5 and L3-4. Dr. Morgan opined that these findings are caused by degenerative disc disease and spondylosis and are <u>preexistent</u> to this neck strain motor vehicle

injury of September 30, 2003. He stated that degenerative disc disease occurs in the normal aging process and is frequently advanced in heavy smokers because of lack of oxygenation to the disc material and, further, that Donna's degenerative disc disease, low back pain and right sciatica were not caused or aggravated by the neck strain injury from the vehicle accident. He opined that the injuries Donna sustained in the accident were limited to her neck and did not encompass injuries to her lower back with right sciatica. Finally, when asked about the possibility of a preexisting condition worsening due to trauma inflicted by an accident, both experts testified that such a possibility exists and cannot be completely discounted.

In addition to the expert testimony, this Court considered the evidence of the Plaintiff's primary treating physician, Dr. Harrington, a general neurosurgeon who also performed the two back surgeries. In his medical records he states, similar to Dr. Feldmann, that Donna suffers from a combination of mechanical and radicular pain symptoms. He has not issued an opinion as to the causation of these injuries. In April of 2005, Donna underwent minimally invasive right L4-5 micro discectomy to treat her radiculopathy. Post operatively, Dr. Harrington described Donna as having very little pain, excellent range of motion of her lumbar spine and indicated that she did very well with the discectomy. The term he used was perioperatively, meaning about or around the time of the surgery. He stated in his reports that Donna returned to him two and a half years later. He described her symptoms as intolerable in degree of low back pain and spasm. Dr. Harrington stated that her pain is debilitating, unremitting and severe. After his diagnosis of failed back syndrome he performed another surgical procedure, a transforaminal interbody fusion, posterior lumbar interbody fusion and a posteroalteral fusion. He described these fusions as "extensive." He stated that two weeks after the surgery, Donna reported her back to feel much better and that it is his impression that Donna was doing quite well with very

little pain in the back and appeared to be healing fairly normally. Six weeks after the surgery, Donna visited him again. Dr. Harrington stated that she continues to have very little back pain and that she is much better. On May 30, 2008, Dr. Harrington stated that Donna had an almost complete resolution of her pre-operative symptoms.

Donna also underwent treatment with various other doctors in the time period between 2003 and 2011. Dr. Broccoli, a chiropractor, Dr. Russo, a neurological surgeon, Dr. Hess, a chiropractor and Dr. DiSanto, also a neurosurgeon, submitted affidavits that it is their opinion, to a reasonable degree of medical certainty, that the injuries sustained by Donna are causally related to the accident of September 30, 2003. None of these doctors show any records of previous visits by Donna before the accident occurred. Furthermore, all of the doctors, with the exception of Dr. Morgan, state that these treatments were a medical necessity. The medical expenses for all above treatments and surgeries total $269,000.

Additionally, Dr. Allan Feldman, an expert economist, testified on the Plaintiff's behalf in an arid yet credible and forthcoming manner. He presented a life-expectancy table and opined that, based upon his calculations, Donna's loss of Future Earnings totaled $99,000. These findings were corroborated by Dr. Feldmann's testimony. In response to the question as to whether Donna would be able to work again in the jobs at which she was employed prior to the accident, Dr. Feldmann stated that "it would be unlikely if there was anything that required certain movement or repetitive action of any kind." Moreover, Dr. Russo assessed Donna's injury as a seven percent (7%) permanent partial impairment of the whole person.

Regarding the issue of pain and suffering and loss of enjoyment of life, Donna testified that, prior to the accident, she was very active, enjoyed running, playing basketball and other recreational activities. She did her own shopping, her own laundry and her own household

chores. She had no trouble standing or sitting before the accident. Her friend Kevin Cordeiro, who testified on her behalf, corroborated these statements and explained that Donna had lived a very active lifestyle.

Donna also testified that she had no back pain prior to the automobile accident and that she began to experience back pain immediately subsequent to the collision. Further, despite the surgical procedures performed upon her, she testified that the back pain has continued unabated, without any relief whatsoever to date. Donna testified that she ceased playing sports due to her constant back pain. She stated that had become unable to perform daily chores and that she required assistance with grocery shopping and doing laundry. Due to her decreased physical activity, she gained a considerable amount of weight and stated that she no longer liked to venture outside. Donna described a dependency on over the counter pain medication drugs. She is now unable to sit or stand comfortably for extended periods of time. When asked for two words to describe Donna's state of existence after the accident, her sister's husband testified that these two words would be "hopeless and helpless." This Court finds that Donna's life has changed considerably for the worse after the accident.

The jury's award of $193,584 shocks the conscience of this Court in its failure to respond to the merits of this issue and in its failure to administer substantial justice. See Shayer, 708 A.2d at 165 (quoting Hayhurst, 441 A.2d at 547); Cotrona, 501 A.2d at 733-34. The award is inadequate and does not cover Plaintiff's medical bills, lost wages or any pain and suffering. This Court can only surmise two possibilities for the utter inadequacy of the award. First, despite this Court's limiting instructions, the Jury took into account that Donna's medical bills were covered by health insurance. The medical records in evidence were replete with references to both Medicare and Medicaid. Alternately, the jury misconceived the significance of the

evidence and disregarded testimony regarding the potential for worsening of a preexisting condition, and therefore the jury undervalued the severity of the injuries sustained by Donna and the resulting pain and suffering she endured. Regardless of the reason for the jury's award of damages, this Court determines it to be inadequate to the point that either an additur is warranted or a new trial must be granted. See Roberts, 116 R.I. at 301-02, 356 A.2d at 218.

Based upon this Court's independent assessment and review of the evidence related to Plaintiff Donna Rose, this Court grants an additur of $428,416 to the jury award of $193,584 for a total award of $622,000. Defendant will be given 30 days to accept the additur of $428,416 for Plaintiff Donna Rose. See Roberts, 116 R.I. at 301-02, 356 A.2d at 218. If the additur is not accepted within that time period, this Court grants a new trial to Plaintiff on the issue of damages. See id.

IV.

CONCLUSION

Based upon the foregoing, this Court grants Plaintiff's Motion for an Additur in the amount of $428,416 for a total award of $622,000. In the event that Defendant does not accept the additur within 30 days, the Court grants Plaintiff's Motion for a New Trial on the issue of damages.