**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**KENT, SC.** **SUPERIOR COURT**

**[FILED: April 18, 2014]**

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| **COLLEEN WOLF** | : | |
| | : | |
| **VS.** | : | **C.A. No. KC 10-1109** |
| | : | |
| **ANDREY MALYUTA** | : | |

## DECISION

**RUBINE, J.** Before the Court is Plaintiff Colleen Wolf's Motion for a New Trial. This case came on for trial by jury on March 11, 2014. The jury returned a verdict on March 17, 2014 in favor of Plaintiff, awarding damages in the amount of $4500. Plaintiff filed a motion for a new trial on March 24, 2014. Defendant filed an objection on March 27, 2014.

### I

### Facts and Travel

Plaintiff brought this claim for injuries she allegedly received as a result of a rear-end motor vehicle accident which occurred on Rt. 1 in the Town of North Kingstown on Saturday, July 22, 2007. The Defendant agreed and stipulated that he was negligent in the operation of his vehicle and that his negligence caused the accident. Since negligence was admitted, the issues at trial were limited to damages, and whether the admitted negligence was the proximate cause of the damages alleged. Plaintiff and her partner, Peter, were the only witnesses who testified with respect to pain and suffering. As to medical expenses allegedly incurred as a proximate result of Defendant's negligence, the Plaintiff introduced medical affidavits from a variety of treating physicians, including a walk-in treatment center that examined her within three days after the accident. The physician at the walk-in center treated Plaintiff for cervical strain based primarily

on her subjective symptomology. Immediately after the accident, Plaintiff reported to police that she was "fine." However, Plaintiff testified that within a few minutes after the accident she incurred swelling and a headache. She drove home from the scene of the accident and did not require emergency medical care. Once home, she noted that she could not use her left shoulder, her entire left side tightened, and she was in a lot of pain. Two days later, Plaintiff was scheduled to go to work at 1:30 p.m. at the Pawtucket Public Library, where she served as a librarian.[1]

Plaintiff did not go to work that day due to the continuing discomfort she was feeling. Instead, Peter took her to a walk-in clinic, where she was seen around 11:00 a.m. According to the Plaintiff, the doctor at the clinic prescribed medication for pain and a muscle relaxant based upon his examination and her reported symptoms of upper back pain and pain on the left side of her shoulder near her neck. The physician at the clinic provided her with a cervical collar and a prescription to see a physical therapist. Plaintiff knew a physical therapist, Lisa Mellow, who she initially saw on July 24, 2007. The therapist performed a therapeutic ultrasound, and Ms. Wolf performed some exercises at the therapist's office. In addition, Plaintiff was provided with a "package of home exercises consisting primarily of stretches for her neck, shoulder and upper back." She was also prescribed hot packs, which she testified she used three times a day. She took the prescribed muscle relaxant, but did not take the pain medication, which she attributed to

[1] So as to avoid speculation as to the damages associated with any loss of work, the Court did not instruct the jury on damages due to loss of work since the Plaintiff introduced no evidence that would allow the jury to quantify such loss. However, it appears from the evidence that she stayed out of work for the entire work week following the accident. Plaintiff's counsel did not object on the record concerning failure to instruct on lost income.

her reluctance to take prescription medicine for pain.[2] She continued to stay out of work the succeeding four days.

## II

## Standard of Review

A motion for new trial is governed by Super. R. Civ. P. 59, which 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."

In ruling on a motion for new trial, the trial justice acts as a super juror and exercises his independent judgment while weighing the evidence and assessing the credibility of the witnesses. McGarry v. Pielech, 47 A.3d 271, 280 (R.I. 2012). 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 97 R.I. 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.,

[2] There is no indication in the record that Plaintiff took any over-the-counter pain medication, which would have been a logical alternative in light of her complaints of excruciating pain and her reluctance to take prescription pain medication.

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 v. Piccardi, 713 A.2d 250, 253 (R.I. 1998) (per curiam). 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 & Hope of R.I., Inc., 637 A.2d 339, 348 (R.I. 1994).

## III

## Analysis

The Plaintiff presented the majority of the medical evidence by way of medical affidavits from Plaintiff's treating physicians and other medical providers such as physical therapists. For each treating medical provider's affidavit, the Plaintiff attached the medical records concerning her examination and treatment over the course of several years following the accident as well as testimony concerning the reasonable cost of such treatment and services.

The only medical witness testifying live at trial was Dr. Louis Mariorenzi, an orthopedic surgeon, who never treated the Plaintiff for any injuries resulting from the July 22, 2007 accident. His testimony, including medical opinions, was derived solely from his review of the medical records of the treating medical providers. Dr. Mariorenzi never examined the Plaintiff at any time. Based upon his review of the records, which contained primarily the subjective reporting by the Plaintiff of her symptoms, including the neck and back pain that she reported to her various treatment providers, he testified to a reasonable degree of medical certainty that the pain Plaintiff experienced after the accident will continue at varying levels until the end of her life. He further offered the opinion, gleaned from an AMA textbook, that the Plaintiff had

suffered a 2% permanent partial impairment of the whole person.[3] In the course of his testimony, he testified that at some unspecified point in her recovery, Plaintiff achieved "maximum medical improvement," (MMI) which he explained indicates that her condition will not get worse and will not get better. Once a patient has reached MMI, she will no longer benefit from further treatment. Finally, it was Dr. Mariorenzi's opinion that he agreed with the diagnosis of a number of Plaintiff's treating physicians that she had suffered a cervical strain/sprain which ordinarily resolves within four to six weeks. He explained, however, that the Plaintiff's complaints of pain and discomfort were intermittent over an extended period of time and that her condition had therefore become chronic. The jury might easily have discounted Dr. Mariorenzi's earlier testimony of permanency in light of his diagnosis of cervical strain/sprain, which he testified ordinarily resolves in four to six weeks.

The jury's verdict of medical damages was limited to $165, which represented only a portion of Plaintiff's total medical expenses. The physical therapist, Lisa Mellow, alone showed treatment from November 16, 2010 through July 6, 2011 with total expenses of $10,581.50. If the jury found credible Dr. Mariorenzi's opinion that Plaintiff suffered a cervical strain/sprain which resolved within four to six weeks of the date of the accident, the jury likely believed that she reached MMI either on May 22, 2007 or July 22, 2007, and would not benefit from the medical treatment she received thereafter. It would be entirely consistent with the evidence, the reasonable inferences drawn therefrom, and the Court's instructions, to award damages attributable to medical expenses incurred only prior to MMI. One hundred sixty-five dollars represents a reasonable finding that only a portion of the medical expenses, as shown by affidavit, should be awarded as medical damages. With respect to damages for pain and

[3] The AMA text was not introduced into evidence, and Dr. Mariorenzi did not credibly explain the factors he considered in reaching the opinion of permanency using the AMA guide.

suffering, the jury awarded only $4335. This Court finds the total verdict of $4500 for medical expenses and pain and suffering consistent with the credible testimony, for injuries sustained in a somewhat minor rear-end accident. The minimal nature of the impact was supported by the photographs of the damage caused to the vehicles in question. The photographs were more credible than Plaintiff's testimony that the impact was so great, she believed immediately after the impact that her car was "totaled" as she had reported to her partner Peter, who was in a different vehicle sufficiently removed from the accident site and did not personally observe the impact.[4]

Other evidence that the jury may have considered which would challenge the credibility of Dr. Mariorenzi's opinion of permanency and Plaintiff's testimony concerning persistent pain and discomfort was the reference in Dr. Harrison's April 28, 2008 report that the Plaintiff is an "avid runner" and on January 15, 2009, that she is "active and athletic" with no reference to shoulder or neck pain. This evidence is compared to Plaintiff's testimony that since December 2011, there was no waking time that she was without pain and discomfort at a level of 5 on a scale of 10, and her deposition from September 2011 wherein she testified that as of that date, she engaged in yoga two times per week and ran on a regular basis. Consistent with the Court's instructions, it was certainly reasonable for the jury to reject Plaintiff's testimony of persistent pain from the date of the accident to the present and to reject Dr. Mariorenzi's opinion of permanency, even in the absence of medical opinion to the contrary.

The Court instructed the jury as follows: "Keep in mind that where the testimony of one witness on a specific item of evidence is contradicted directly by the testimony of another

[4] The Plaintiff's testimony that the impact was such that she believed her car had been "totaled" is not credible in light of the credible evidence that the impact was not significant. If the jury found her testimony of impact exaggerated, it would likewise be reasonable to reject her testimony of the extent of injury as exaggerated as well.

witness and there is no other witness testifying on such item, you are not required to therefore consider the evidence evenly balanced or the item not proved. In such a situation, you may determine which of the two witnesses you believe on the basis of all the surrounding facts and circumstances proved at trial, and, you may believe one witness rather than the other if you believe the facts and circumstances warrant it. Similarly, you may reject the testimony of a witness even though his or her testimony stands uncontradicted if you believe the evidence in the case and your assessment of the credibility of the witness warrants that." The jury was further instructed that "simply because a witness has been identified to you as an expert does not mean that you are required to accept what he or she says as true. You must consider each expert opinion admitted into evidence in this case and give it such weight as you think it deserves. You may entirely disregard the opinion of an expert or any part of the opinion of an expert. In doing so, you may consider all of the other factors that I reviewed with you when I instructed you on the credibility of witnesses generally."

The jury deliberated over a period of two days. Their verdict was neither inconsistent with the facts nor the law. In the Court's opinion, the outcome produced was a fair and just verdict. Certainly a verdict of $4500 was more reasonable than the suggestion of Plaintiff's counsel in his closing argument that on pain and suffering alone, a verdict should have been returned of over $1,000,000. Had the jury followed the suggestion of Plaintiff's counsel, in this Court's opinion, the award would have been excessive and not justified by the credible evidence when viewed in the context of the Court's instructions.

## IV

## Conclusion

It is this Court's independent judgment and assessment of the credible evidence, when viewed in the light most favorable to the prevailing party, that reasonable minds could differ over the weight and credibility of the evidence, and that the jury's verdict and damages awarded did not fail to administer substantial justice. See Soares, 637 A.2d at 348. For these reasons, the Plaintiff's motion for a new trial is denied.

**RHODE ISLAND SUPERIOR COURT**

***Decision Addendum Sheet***

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| **CASE NO:** | C.A. No. KC 10-1109 |
| **COURT:** | Kent County Superior Court |
| **DATE DECISION FILED:** | April 18, 2014 |
| **JUSTICE/MAGISTRATE:** | Rubine, J. |
| **ATTORNEYS:** | |
| For Plaintiff: | David W. Carroll, Esq. |
| For Defendant: | Kathleen Wyllie, Esq. |