IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PATRICIA B. HELMER-HOFFMAN,	**:**	**No. 00-00769**
	:	
vs.	**:**	**CIVIL ACTION - LAW**
	:	
JOSH BUTTERS,	**:**	
Defendant	**:**	**Motion for New Trial**

OPINION AND ORDER

This matter came before the Court on the Plaintiff's Motion for New Trial filed on March 11, 2003.

The Plaintiff Patricia B. Helmer-Hoffman filed a Complaint in May 2000, asserting a personal injury action against Defendant Josh Butters. The case was delayed for a significant period of time, because the Defendant was on active duty with the United States Armed forces, serving in the Middle East. When Defendant Butters returned to the United States and became available for trial, a jury trial was held on March 6-7, 2003. The Defendant conceded negligence at trial and the issue presented to the jury was whether the Defendant's negligence was a substantial factor in bringing about harm to the Plaintiff. The remainder of the special verdict questions dealt with the damages suffered by Plaintiff concerning the Defendant's negligence. Special verdict question No. 1 read as follows: "Was Josh Butters' negligence a substantial factor in bringing about the Plaintiff's harm?" Question No. 1 was the exact question proposed by Plaintiff on a proposed jury verdict slip, which Plaintiff submitted at the

beginning of the trial. See Plaintiff's proposed jury verdict slip.[1] The jury answered Question No. 1 "No" and returned to the courtroom to announce its verdict in favor of the Defendant.

The underlying facts of the case concern an automobile accident, which occurred on Saturday, May 23, 1998. Helmer-Hoffman, age 37 at the time of the accident, was driving her automobile on State Route 87 in Lycoming County. At approximately 1:00 p.m. she stopped her vehicle to make a left hand turn into a driveway of a friend's home. Ms. Helmer-Hoffman's one (1) year child, her mother and a girlfriend were passengers in the vehicle.

The Plaintiff's vehicle was struck in the rear by a vehicle driven by Defendant Butters, who was traveling on Route 87. The Defendant's vehicle pushed the Plaintiff's vehicle into a ditch. The Plaintiff was able to drive her vehicle into the driveway where she was attempting to turn. The air bags did not deploy. The Plaintiff was wearing a seat belt.[2] None of the passengers in Plaintiff's vehicle were injured. The Pennsylvania State Police responded to the accident. The Plaintiff told the responding officer that she was okay and declined an ambulance. At that time, she went into her friend's house to have lunch. She felt okay during

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1 At this time, the Court does not have a full trial transcript. It is possible that Plaintiff's counsel, before the jury was charged, asked the Court to direct a jury verdict on Question No. 1. the Court would defer to whatever the record would reveal on this subject.

2 At trial, the Plaintiff testified that she hit her head on the steering wheel upon impact of the Defendant's vehicle. She admitted on cross-examination that she told her witness Dr. Ross that she was pretty sure she

this time period.

Plaintiff testified that a few hours later she had pain in her head, neck, shoulders and lower back. As a result, her mother drove her home. The next morning the Plaintiff testified she had trouble getting out of bed. However, she attended a meeting concerning her son's private school teacher. She drove herself to the meeting. As the meeting progressed she felt worse. A friend had mentioned a chiropractor to her, Dr. Dan Solley, and she testified she called his office on Sunday and left a message on his answering machine.

On Monday, the Plaintiff decided she could not attend a wedding, which she was scheduled to attend in Wilkes-Barre. She did not feel well and stayed in bed or on the couch. She did not call a doctor or go to a hospital emergency room because she claimed she felt an emergency room would give her a neck brace, which she did not want.

Dr. Solley's office returned Ms. Helmer-Hoffman's call on Tuesday, May 26 and she went to his office for an examination that same day. Dr. Solley felt the Plaintiff had whiplash injuries and he treated her with pressure point massage on a regular basis for three (3) days a week until July 1999.

At trial, the defense denied causing any compensable injury to the Plaintiff and argued her problems were pre-existing conditions, which Plaintiff had suffered from before

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hit her head. She did not have any abrasions to bruises on her head.

the accident.

The Plaintiff has a significant history of pre-existing injuries or conditions to the parts of her body she claimed were injured on May 23, 1998. The most serious injury or condition which Plaintiff claimed was caused by the 1998 accident was a debilitating pattern of migraine headaches. Plaintiff testified that several hours after the accident she developed a headache. As the day progressed the headache turned into a full grown migraine headache. The migraine headache was constant and completely debilitating for the first year after the accident.

Plaintiff acknowledged there was a period of time around May 1999 to April 2000, when Dr. Roeltgen, a neurologist, placed Plaintiff on a medication regime, which had Plaintiff felling much better. In this time frame, the Plaintiff was able to work and purchased a tanning salon business. However, Plaintiff claimed that after this time period of some relief, the migraine headaches returned again and became completely debilitating. Plaintiff claimed that at least four (4) days out of every week she is not able to function because of the migraines and that neighbors have to help her care for her children. She also asserted she is not able to perform at her business and other employees must take care of the business. She testified that she can only work about one (1) day per week.

In January 2001, Plaintiff began to see Dr. Stephen Ross at the Hershey Medical Center. Dr. Ross is a

neurologist. Dr. Ross suggested the use of botoxin injections to try to reduce the migraine headaches and pain she suffered. The botox injections are given in the head, neck and forehead, and the injections temporarily paralyze the muscles in these areas.

Plaintiff testified she gets very ill after the botox injections and she is incapacitated for seven to eight (7-8) days after she receives the injections. Thereafter, she feels relief for a month or so. However, after this month of relief, she testified the migraine headaches return in a severe and disabling manner. Plaintiff receives the botox injections several times a year. She contended her migraine headaches are a permanent condition that was caused by the accident on May 23, 1998. The Plaintiff testified that because of her extreme pain, she has monthly prescriptions drug bills totaling $331.85. She has an average of 3 ½ botox injections treatments per year at a cost of $1,817 for each treatment, or $6,359 per year. Plaintiff also testified that her extreme headache pain causes severe depression and has caused her to think about suicide. She believes she will have this condition for the rest of her life, and that because of it, she is unemployable except for her own business and that other people must do the work for her.

While the migraine headaches were the most serious injury alleged by Plaintiff from the accident on May 23, 1998, and are the major component of Plaintiff's significant damages claim, Plaintiff also claimed she received some whiplash type

injuries from the subject accident. She has been treated for these injuries primarily by chiropractor Dan Solley. Dr. Solley initially treated Plaintiff three (3) days a week and he gave her pressure point massages. He also gave Plaintiff cortisone shots. Plaintiff saw Dr. Solley until she had what she described as a mini-stroke, which was unrelated to this accident, and she claimed Dr. Solley did not want to work on her neck after this. She stopped treatment with Dr. Solley in July 1999, although she has since gone back to him.

Dr. Solley testified at trial that he first saw Plaintiff on May 26, 1998, and she gave him the history of the rear-end accident of May 23, 1998. He found cervical dorsal strain consistent with whiplash and rotator cuff impingement. He treated Plaintiff into 1999 and noted her condition to be unchanged, with frequent exacerbation of her symptoms.[3] Dr. Solley recently began treating Plaintiff again and he opined her condition is permanent. He charges Plaintiff $60.00 per visit and feels she will need to see him three to six (3-6) times per month. Dr. Solley opined the injuries were causally related to the accident of May 23, 1998. On cross-examination, Dr. Solley, conceded that the basic diagnosis is whiplash and that there is no diagnosable structural damage to her cervical spine seen on X-ray. Thus, he describes the injury as soft tissue connective damage.

At trial, the Plaintiff sought damages in excess of

3 Dr. Solley notes that frequency of the problems from the injury decreased and that the intensity of the injury has decreased, but she is still

one-half million dollars, including past lost income of $61,255, future lost income of $162,750, over $3,000 per year for chiropractic treatment on a permanent basis, and $503,000 for future medical bills (medication and botox injections).

As previously stated, complicating the case is fact that the Plaintiff has a significant history of pre-existing injuries or conditions including a long history of migraine headaches and pain in the neck, cervical and shoulder areas. There is also history of a post-accident stroke or mini stroke.

On direct examination, Plaintiff's counsel elicited that Plaintiff was in an automobile accident in Nevada in 1980 where she injured her back. She testified her back healed after five to six (5-6) months. After the accident in Nevada, she suffered from migraine headaches in the 1980's, which came with her menstrual periods. The headaches subsided for a number of years, but around 1989 she began to have regular migraine headaches. With these migraines, Plaintiff experienced sensitivity to light and sound and she would become nauseated and could not function. In order to alleviate the pain, Plaintiff would lie down in dark room and take pain medication. She claimed these migraines headaches would last about a day. In 1995, she had two episodes close together of severe migraines, which led to her being prescribed prozac.

Plaintiff testified that the migraine headaches that

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subject to frequent exacerbation of symptoms.

she suffered from before the May 1998 accident came with her menstrual period and, while they were very severe, they only lasted one (1) day. Plaintiff differentiated the post-accident migraine headaches as not necessarily coming with her menstrual period and being more severe and lasting many days.

On cross-examination, Plaintiff acknowledged that at the time of the accident she didn't work because she was a stay-at-home mom. She agreed in February of 1999 she began to feel better and could take care of the house and on one occasion shoveled snow. She acknowledged in this time frame to an occasion where she drove her son to Pittsburgh and back, and that on good days she had no problem driving. She began working at the tanning salon in April 1999. She acknowledged she had a "mini stroke" in 1999. In the summer of 2000, she performed body wraps on customers. In May of 2000, she was supposed to attend physical therapy for her medical problems, but she didn't because of her busy work schedule. She stopped treatment with her chiropractor (Dr. Solley) in July 1999, and didn't have further chiropractic treatments with another chiropractor, Melinda McKee, until May 2000. She acknowledged she told her neurologist, Dr. Roeltgen, that her headaches were improving and she was happy with the medication regimen she was prescribed.

On cross-examination, Plaintiff testified that her car flipped over and she suffered a concussion and broken jaw in the 1980 Nevada accident. In late 1995-96, she had breast reduction surgery to help alleviate her neck pain, back pain

and headaches.

When the Plaintiff moved to Williamsport, Pennsylvania in 1991, she treated with Dr. Leonard Collins for headaches. In September 1993, the headaches increased because she had a very stressful job. In September 1994, she had fatigue and trouble sleeping. In 1995, she had memory lapses. She acknowledged a May 16, 1995 record of her family doctor Mona Chang that indicated memory lapses lasting for two (2) months. She was hospitalized for temporarily paralysis when in high school.

Plaintiff also produced medical testimony from Dr. Stewart Olinsky, a neurologist who examined Plaintiff on January 26, 2001 as part of an independent medical evaluation arranged by the defense, and Dr. Stephen Ross, whose testimony was presented through a deposition taken on January 14, 2002. The defense called no medical witnesses at trial.

Dr. Ross, in his trial deposition, testified to his contacts with Plaintiff. The first time he saw her was January 24, 2001, when she came to him because of her headache problems. In the history given by Plaintiff she described the onset of her headaches being May 23, 1998, the date of her accident with Defendant Butters. See Dep. of Dr. Ross at 7. She related the frequency of the headaches as a daily and the duration as constant. Id. at 8. She claimed routine activity exacerbated the pain. Id. She told Dr. Ross that during the accident she was "pretty sure" that she hit her head on the steering wheel.

In his examination of the Plaintiff, Dr. Ross found Plaintiff to be neurologically normal. Id. at 9. Dr. Ross suggested the use of botox injections, specifically to the left occipital or rear of the head and left forehead. Id. He also suggested increasing her preventative pain medicine, specifically, amitriptyline. Id.

Dr. Ross continued to see Plaintiff over a three (3) month period with the treatment being Botox injections and recommendations for ongoing pain psychology. Id. at 10. Dr. Ross found Plaintiff's condition to be consistent with debilitating headaches. Id. at 11. He rendered his opinion based on the visits she had with him and based upon her report of the pain to him. Id.

Dr. Ross noted Plaintiff has had severe depression and he opined that an individual with recurrent severe headaches like Plaintiff has a high frequency of developing depression. Id. at 13.

When Dr. Ross was asked by Plaintiff's counsel his prognosis for Plaintiff, he testified that he didn't believe she would return to the level of pain control she had prior to May 23, 1998. Id. at 13. When he was asked how long the condition would last, Dr. Ross indicated he did not know and stated: "I'd have to say it's indefinite. I don't know how long it is going to take." Id. Dr. Ross feels Plaintiff will need Botox injections three to four (3-4) times per year for the "foreseeable future." Id. at 14. In response to Plaintiff's counsel, Dr. Ross opined that the accident of May

23, 1998 as described by Plaintiff was the precipitating or aggravating cause of the migraine headache problems experienced by Plaintiff. Id. at 17.

On cross-examination, the defense sought to show that Dr. Ross, in forming his opinions, was not aware of Plaintiff's significant prior history of migraine headaches and that she had not provided him with details of the 1998 accident. It appears in doing this that the defense was also trying to point out that the credibility of Dr. Ross's opinion and conclusions were reliant upon the credibility of Plaintiff. In cross-examination, the defense also focused on the stroke suffered by Plaintiff in July 1999, which was unrelated to the May 1998 accident, and the consultation notes of neurologist Dr. Roeltgen.

Dr. Ross admitted that he had no prior information concerning Plaintiff's longstanding history of migraine headaches since Plaintiff told him the outset of the problem was the accident of May 23, 1998. He stated: "Again, referring back to my own letter, January 24, 2001, what was told to me was the onset was May 23, 1998, so no, I had no information that it was a longstanding sort." Id. at 22.

In cross-examination, defense counsel showed Dr. Ross records of other medical providers. He was shown Defendant's Exhibit 2, a record of Dr. Mona Chang from September 3, 1993, which talked of increased headaches, her life falling apart, anxiety attacks, et cetera. Id. at 24. He agreed a note of September 21, 1994, from Dr. Chang, showed

Plaintiff was prescribed Prozac for these problems. Id. at 25.

Dr. Ross was shown Defendant's Exhibit 3, an October 10, 1994 record from Dr. Thomas Olenginski of the Arthritis Center, which indicated Plaintiff suffered from persistent fatigue, headaches and weight gain and that she was treated in part with a beta blocker and anti-depressants for migraines headaches. Id. at 26. The record indicated Plaintiff has, "chronic headaches and fatigue that, in part, were helped with anti-depressant therapy." Id. at 27; Defendant's Exhibit 3. A record of Dr. Olenginski dated February 27, 1995, also noted Plaintiff had chronic fatigue and chronic headaches. Id. at 28.

Defendant's Exhibit 4, a medical a record made by Dr. Mona Chang on May 16, 1995 after an examination of Plaintiff, noted fatigue insomnia and migraine headaches. Id. at 28-29. The record also indicated crying spells, mood swings, and memory lapses. Id. at 29.

Dr. Ross was shown Defendant's Exhibit 5, a November 6, 1996 consult letter from Dr. Donald Nardone of the Susquehanna Health System, which mentions a history of an auto accident and concussion. Id. at 31. The letter goes on to indicate Plaintiff was hospitalized in the past for paralysis from the neck down, which resolved on its own and was never explained. Id. at 32.

Dr. Ross was shown Defendant's Exhibit 6, a September 22, 1998 consult letter of Dr. Roeltgen, which notes Plaintiff had a long history of migraines headaches that were

on the left or right frontal portion of Plaintiff's head. Id. at 36.[4] The history of these headaches included nausea, light sensitivity (photophobia) and sensitivity to sound (phonophobia). Id. at 37. The history of these headaches went back eight or nine years. Id. at 38. In discussing the history of migraines headaches, Dr. Roeltgen notes in his letter of September 22, 1998 that treatment through medication and anti-depressants historically decreased her headaches from a frequency of one per week to a few per month and lasting from a few days to lasting a day or less. See Defendant's Exhibit 6; Dr. Ross's Dep. at 37-38.

The defense also questioned Dr. Ross concerning Defendant's Exhibit 7, a consultation report authored by Dr. Roeltgen on July 13, 1999 at the request of a Dr. Haskell. The reason for the consultation was that Plaintiff apparently suffered a mini-stroke.

In his July 13, 1999 report, Dr. Roeltgen noted that Plaintiff developed an abnormal feeling up the side of her back and head and a loss of hearing in her left ear after a chiropractic manipulation. She thought she was developing a migraine headache and she went to bed. When she awoken she did not have a headache, but noticed that the left side of her face and the inside of her left check were numb. Also, the left side of her face drooped. She reported to the emergency room of the Williamsport Hospital. Dr. Roeltgen concluded

4 Defendant's Exhibit 6 is a consult letter dated September 22, 1998 from Dr. David Roeltgen to Plaintiff's chiropractor, Dr. Dan Solley.

that Ms. Helmer-Hoffman had right hemispheric dysfunction most consistent with a stroke. He suggested a stroke workup. Defendant's Exhibit 7. While discussing Ms. Helmer-Hoffman's headache problem, Dr. Roeltgen also stated that the headaches currently "are not disruptive to her life." Defendant's Exhibit 7. In his cross-examination of Dr. Ross, defense counsel also elicited that Dr. Roeltgen, in responding to a letter from Plaintiff's Attorney Bonner, opined that the stroke suffered by Plaintiff in July 1999 was not related to the vehicle accident of May 23, 1998. See Defendant's Exhibit 9, letter of July 3, 2000 from Dr. Roeltgen to Attorney Bonner; see also Dep. of Dr. Ross at 40-44. Dr. Ross acknowledged in his deposition that Plaintiff had not made him aware of the information portrayed in these medical records. Dep. of Dr. Ross at 44.

Finally, Dr. Ross admitted on cross-examination that Plaintiff had not told him about the prior history of headaches. Id. at 47. Dr. Ross also conceded the results of his neurological examinations of Plaintiff were consistently normal. Id. at 51, 53.

Subsequent to the jury's verdict, Plaintiff filed a timely motion for a new trial. Plaintiff raised several issues in her motion. She claims the Jury's verdict was against the weight of the evidence. She next claims the Court erred in its jury charge concerning causation in that the Court used the term "substantial factor" in explaining causation. Plaintiff also complains in her motion that the

Court erred in permitting certain evidence regarding her preexisting medical problems to be considered by the jury. The next issue raised by the Plaintiff is that the Court erred in permitting the Defendant to file their answer and new matter after the jury was drawn. The final issue pertains to the Court's ruling that the Plaintiff could not offer into evidence a written opinion of Dr. Roeltgen, who did not testify as a witness in this case. The Court will discuss the issues seriatum.

I. Verdict Against the Weight of the Evidence

The Court feels this is the most difficult issue presented. In summary, the Plaintiff contends the jury's verdict that the Doctor's negligence was not a substantial factor in bringing about her harm was against the weight of the evidence. She contends all three medical witnesses who testified in the case on her behalf, Dr. Ross, Dr. Solley and Dr. Olinsky, opined that Plaintiff suffered some injury as a result of the accident on May 23, 1998. In making this argument the Plaintiff notes that the Defendant presented no medical testimony to counter Plaintiff's medical testimony. Thus, Plaintiff argues that the jury could not reasonably determine that there was no compensable injury as a result of the Defendant's negligence.[5]

Both Plaintiff and Defendant agree on the basic law

5 However, since this was a limited tort case Plaintiff was required to prove that she sustained a serious impairment of a body function as a result of the May 23, 1998 accident to recover damages for pain and suffering. 75 Pa.C.S.A §1705(d).

that applies to this issue, i.e., the trial court must find that the jury verdict, which failed to award damages to Plaintiff, shocks the conscience. Armbruster v Horowitz, 572 Pa. 1, 9-10, 813 A.2d 698, 703 (Pa. 2002). A judgment notwithstanding the verdict is proper only where the facts are such that no two reasonable minds could disagree that the verdict was improper. Majczyk v Oesch, 789 A.2d 717, 720 (Pa. Super. 1999) citing Birth Center v St. Paul Co., Inc., 727 A.2d 1144, 1154 (Pa.Super. 1999). Further, questions of credibility and conflicts are for the fact finder; the court will not substitute its judgment for that of the fact finder on such questions. Majczyk, at 720. The Court must view the evidence in the in the light most favorable to the verdict winner and give the verdict winner the benefit of every reasonable inference arising therefrom while rejecting all unfavorable testimony and inferences. Id.

The Court has painstakingly presented the underlying facts of the case submitted to the jury because the only logical way to approach a determination of whether the finding of the jury in this case "shocks the conscience" is to review the totality of the facts which they considered in making their decision. It is not enough to say that the jury's verdict was against the weight of the evidence simply because the three medical witnesses were favorable to the Plaintiff's contention and the jury's verdict was inconsistent with the medical witnesses. It is within the jury's prerogative to accept or reject the credibility of any witness, including

expert witnesses as long as the jury's conclusion is reasonable and is not shocking to one's conscience or the interests of justice.

Both Plaintiff's counsel and Defendant's counsel have been diligent in submitting the case law surrounding this issue to the Court. Plaintiff's counsel submitted the following cases: Lemmon v. Ernst, 822 A.2d 768 (Pa. Super. 2003); and Kraner v. Kraner, CP Lawrence County, Nov. 6, 2002, citing Andrews v. Jackson, 800 A.2d 959 (Pa. Super. 2002). Defendant's counsel submitted: Peterson v. Shreiner, 822 A.2d 833 (Pa. Super. 2003); Kennedy v. Sell, 816 A.2d 1153 (Pa. Super. 2003); and Majczyk v. Oesch, 789 A.2d 717 (Pa. Super. 2001)(en banc).

In Andrews v. Jackson, a jury found a driver negligent when he backed a moving van into a Plaintiff's vehicle. The Plaintiff had neck and back pain after the accident. The evidence also established that Plaintiff had been warned that his vertebra had been weakened by a prior injury and that any trauma to his head or neck could result in paralysis. Plaintiff also had cervical arthritis that had developed into spinal stenosis before the accident. Plaintiff's doctor concluded the arthritis and resulting stenosis became symptomatic after the accident and contributed to Plaintiff's neck pain. At trial Plaintiff's medical expert testified that the accident aggravated Plaintiff's prior ailments requiring surgery to his neck. The expert opined the accident awakened Plaintiff's prior conditions making them

symptomatic. The defense expert at trial rejected Plaintiff's claims that the accident aggravated his prior condition but conceded that the Plaintiff had indeed suffered a soft tissue injury (cervical strain) in the accident. The jury found that the Defendant's negligence was not a substantial factor in causing Plaintiff's injuries and awarded no damages. The trial court granted Plaintiff a new trial on damages finding both parties' medical experts had agreed Plaintiff suffered some injury as a result of the accident.

The Superior Court in Andrews v. Jackson, upheld the trial courts grant of a new trial on damages holding that a jury may not disregard the uncontradicted testimony of both parties' medical witnesses that Plaintiff suffered some injury in the accident. However, the Superior Court also stated that the jury could decline to award damages on the basis that the injury was not serious enough to warrant compensation. 800 A.2d at 965; see also Lemmon v. Ernst, which relied on Andrews v. Jackson.

In Majczyk v. Oesch, 789 A.2d 717 (Pa. Super. 2001)(en banc), the Plaintiff sued a driver whose vehicle bumped the vehicle in which Plaintiff was a passenger when the Defendant's vehicle drifted forward. The Plaintiff claimed she suffered a herniated cervical disc from the mild impact. The Superior Court certified the Majczyk case for an en banc review to address further whether the jury's verdict against the Plaintiff was against the weight of the evidence.

At trial in Majczyk two of the Defendant's medical

witnesses conceded that Plaintiff Majczyk was injured in the accident. However, the Superior Court noted that it was clear that the Plaintiff was seeking compensation for her ongoing pain and suffering from a herniated disk, "not for a few days or weeks of discomfort". Majczyk, 789 A.2d at 721. The Superior Court en banc then stated the issue as follows:

> Thus the question before us is whether a jury may find for the defendant despite his or her obvious negligence because it does not believe that plaintiff's pain and suffering, if any, are compensable. We conclude that such a determination is well within the province of the jury."

Id. The Superior Court in the Majczyk case cited to the case of Holland v. Zelnick, 329 Pa. Super. 469, 478 A.2d 885 (1984), where the Superior Court upheld a trial court's denial of a new trial noting that:

> The jury was not required to award plaintiff any amount as it obviously believed that any injury plaintiff suffered in the accident was insignificant.

Majczyk, 789 A.2d at 724, quoting Holland, 478 A.2d at 888. The Superior Court in Majczyk determined that the jury's verdict in not awarding damage was not against the weight of the evidence thus denying Plaintiff's request for a new trial or damages. The Superior Court, in rejecting Plaintiff's request, noted that Plaintiff was seeking compensation for an alleged serious injury, i.e. pain and suffering from a herniated disc, not for a few day or weeks of discomfort. The Superior Court held:

> By our decision today, we are not suggesting that a jury cannot award pain and suffering damages for minor injuries. Rather, we hold that the determination of what is a compensable injury is uniquely within the purview of the jury. As a result, we find no abuse of discretion in the trial court's refusal to grant a new trial based on the testimony set forth.

Majczyk, 789 A.2d at 726 (citation omitted).

This court believes the case of Peterson v.Shreiner, 822 A.2d 833 (Pa. Super. 2003) is very instructive to our case and has some significant similarities to this case. The Peterson case, as in the case sub judice, involved a motor vehicle accident where the Plaintiff initially reported no injury. Also like this case, the Plaintiff presented medical testimony at trial and the defense presented no medical testimony. In the Peterson case, the defense made no concession that the Plaintiff suffered some injury caused by the accident in question and while conceding negligence, defended the case by arguing that the negligence was not a substantial factor in causing the injuries complained of by the Plaintiff.

The Superior Court in Peterson then reviewed the Plaintiff's uncontradicted medical testimony and found the jury could reasonably reject it. 822 A.2d at 839. The Court noted that Plaintiff's medical witness did not examine Plaintiff until three years after the accident in question. Id. Also Plaintiff's medical witness admitted most of the information he relied upon regarding Plaintiff's symptoms and physical condition was obtained through the history provided

by the Plaintiff herself. Id. Further, the medical witness never reviewed records from the previous accident that Plaintiff was involved in. Id. The Peterson Court found that the jury, in it's role of fact finder, could choose to disregard the uncontradicted medical experts opinion as the jury was "free to believe all, some or none of the testimony presented by a witness". Id., citing Neison v. Hinds 653 A.2d 634, 637 (Pa. 1995). The Peterson Court concluded: "The jury presumably decided not to believe Dr. Matthews' opinion and, on this record, the Jury's rejection of that evidence was justifiable." Id.

The Superior Court in the Peterson case also stressed that the issue of causation, whether a Defendant's negligence was a substantial factor in causing a Plaintiff's injuries, is "one lying within the purview of the jury." Id. at 840.

Similar to the Peterson case is the case of Kennedy v. Sell, 816 A.2d 1153 (Pa. Super. 2003). In Kennedy, the male Plaintiff was a passenger in a vehicle driven by Defendant Sell. Sell ran a red light causing an auto accident. Negligence was conceded. Kennedy had prior surgeries on his shoulder. He required two subsequent surgeries after the auto accident. At trial Plaintiff and his doctor essentially related all of the subsequent problems to the auto accident. There was uncontraverted evidence that Kennedy suffered bruises from the accident. The defense presented no medical evidence. However, the defense did not concede that there were compensable injuries from the

accident. The defense also challenged the Plaintiff's medical expert on cross-examination and impeached the testimony of Kennedy himself. The jury found for the defense by answering a special verdict question finding the Defendant's negligence was not a substantial factor in bringing about the Plaintiff's harm. The Plaintiff appealed arguing that, since there was uncontroverted evidence that Kennedy suffered some injury from the automobile accident, the jury's verdict failing to award him some damages shocked the conscience.

The Superior Court in Kennedy v. Sell affirmed the jury verdict, holding the jury's finding did not shock the conscience for two reasons. First, the Court found that, despite plaintiff's medical testimony, the jury could have found any injuries to Plaintiff to be so minor as to not require compensation. 816 A.2d at 1156-1157. Second, the Court found that the way Plaintiff tried the case waived any claim for minor damages. Id. at 1157-1158. The Superior Court noted Kennedy's focus at trial was that all his subsequent problems and surgeries were caused by the instant accident. The Superior Court felt that once the jury rejected Kennedy's large damage claim, Kennedy could not complain that the jury did not award him some smaller amount of damages for more minor injuries. Id. at 1155.

The Court finds that the case at bar is more akin to the Peterson and Kennedy cases than the cases relied upon by the Plaintiff. Here, Plaintiff was seeking to recover over half a million in damages attributing all problems, and

primarily her disabling migraine headache problems, to the accident of May 23, 1998. The jury could have accepted Plaintiff's medical evidence and awarded substantial damages to Plaintiff. However, based on the record in this case the court cannot say the jury's failure to do this was unreasonable or shocking to the conscience. While Plaintiff's doctors offered opinions that Plaintiff's migraine headaches (Dr. Ross and Dr. Olinsky) and upper body pain (Dr. Solley) were caused or aggravated by the accident of May 23, 1998, such opinions were primarily based upon the subjective reporting and complaints of Plaintiff. In rejecting the doctor's opinions, the jury in large part was rejecting Plaintiff's credibility as to her complaints and her connection of her complaints to the accident. The Court notes, although Plaintiff was positive she hit her head on the steering wheel upon the impact of the Defendant's vehicle in here trial testimony, she was impeached with ambiguity in her statement to Dr. Ross (she was "pretty sure" she hit her head) and with the fact that she suffered no cuts, abrasions or bruises. Obviously, this point was important to Plaintiff's connection of her migraine headache problems to the accident.

It was also clear that this was a low speed, minor traffic collision. No one else in Plaintiff's vehicle was hurt in the accident. Both vehicles were driven away from the accident scene. Plaintiff went about her activities after the accident. She told the State Policeman who responded to the accident that she was okay. She didn't see a doctor until the

Tuesday after the accident.

Equally important is the fact that Plaintiff admittedly had conditions and problems prior to the accident in the same parts of her body that she complained about subsequent to the accident. Plaintiff's problems with severe migraine headaches started to occur regularly in 1989, some 9 years before the accident. These migraine headaches were severe enough that she experienced sensitivity to light and said she would become ill to the point that she couldn't function. The migraines also were sufficiently severe that she took Prozac and other medications both to alleviate and to prevent them. The migraine headaches prior to the accident caused fatigue, difficulty sleeping and memory lapse. A record of her family doctor, Dr. Chang, from 1995 indicated memory lapses lasting for two months.

Plaintiff likewise had a preexisting history of pain in her neck, cervical and shoulder areas. In 1995-96, she had breast reduction surgery to help alleviate the pain she had in her back and neck, as well as her headaches.

After the accident on May 23, 1998, Plaintiff suffered what appeared to be a stroke, which admittedly was unrelated to the accident. She experienced some droop or paralysis in the left side of her face. Also in 1999 Dr. Roeltgen made notations in his reports describing Plaintiff's headaches as being under control without any side effects. See Defendant's Exhibit 8. He also described the headaches as not being disruptive to her life. See Defendant's Exhibit 7.

In this time frame Plaintiff admittedly felt better, she was able to work and she purchased a tanning salon business. However, after her stroke her condition once again worsened and became more disabling, especially her migraine headaches.

It appears to the Court that the jury had ample evidence to explain their lack of acceptance of Plaintiff's claim that her post accident problems were caused by the accident. She had the same or similar conditions long before the accident and serious medical problems, such as a stroke, after the accident. The jury may well have believed she was trying to collect significant damages in this case for a long history of preexisting medical and physical problems.

There are other reasons the jury may have rejected Plaintiff's medical testimony. Dr Ross, Plaintiff's key medical witness, did not examine Plaintiff until January 2001, over 2½ years after the subject accident. Dr. Ross also had no knowledge of Plaintiff's prior significant medical history and preexisting conditions including her migraine headache history prior to being cross-examined by defense counsel. In essence, Dr. Ross relied upon the subjective complaints and reporting of Plaintiff in forming his opinions. Plaintiff's neurological exams were normal. Surprisingly Plaintiff reported to him that the onset of the migraine headache problem came with the accident on May 23, 1998.

Dr. Solly, the chiropractor's testimony, was also reliant on Plaintiff's reporting. He acknowledged that Plaintiff's injury was a soft tissue or whiplash type injury

and there was no diagnosable structural damage to her cervical spine seen on X-ray. He described the injury as soft tissue connective damage. The Defense also developed on cross examination that Dr. Solly's expert report dated March 3, 2003, just days before the trial, was signed by Dr. Solly but was written by Plaintiff's counsel.

Dr. Stuart Olinsky, a neurologist, performed an examination of the Plaintiff on behalf of the Defendant on January 26, 2001. He was also called as a witness for the Plaintiff. Dr. Olinsky is a partner of Dr. Roeltgen, who had been a treating physician for the Plaintiff. See Defendant's Exhibit 8 (Dr. Roeltgen's records). Dr. Olinsky credited Plaintiff's reports to him that the migraine headaches she suffered after the 1998 accident were more frequent, more intense and longer in duration than the pre-accident migraine headaches. Based on this self-reporting, he related her continuing headache problems to the accident. He also noted Botox injections to be an appropriate form of treatment for the headache problems. However, on cross-examination Dr. Olinsky acknowledged the significance of Plaintiff's prior migraine headache problems to include nausea, light sensitivity (photophobia) and sound sensitivity (soniphobia). He also acknowledged that prior to the accident Plaintiff's headaches were debilitating enough to require her to two prophylactic medications per day.

While the three medical witnesses called by the Plaintiff were helpful to her contentions that the May 1998

accident caused or aggravated her medical condition, the jury was not compelled to accept their conclusions. Credibility of witnesses and their opinions and issues of causation are uniquely within the province of the jury as fact finders.

It appears reasonable, and is within the province of the jury's fact finding objective, to find that the Plaintiff's post-accident problems were a continuation of her long standing migraine headache problems that at times were disabling and required significant medication. Likewise, the jury could have felt the shoulder and cervical problem were problems she experienced before the accident. The jury may have decided against the credibility of the Plaintiff in regard to her testimony and in regard to her subjective complaints to the doctors. The jury may well have found the extent of the Plaintiff's claim of long-term permanent injuries from a relatively insignificant vehicle accident to be unbelievable and not credible. The Court cannot say such a finding by the jury, based on all evidence and testimony in the trial, to be unreasonable or so shocking to the conscience that the jury's finding in this case must be overturned as a matter of law.

Accordingly, the Court will deny Plaintiff's request for a new trial notwithstanding the verdict.

The second issue raised by Plaintiff in her Motion for New Trial is that the Court erred in instructing the jury on causation by using the term substantial factor instead of

"legal cause."[6]

After completion of the trial, Plaintiff's counsel, by letter dated April 23, 2003, for the first time, sent the Court the Pennsylvania Suggested Standard Civil Jury Instruction that substituted the words factual cause for substantial factor. Up to this time, the standard jury instructions used the term substantial factor. See PaSSJI 3.25, 5.50, 6.01(c)(2), 6.02(1)(2). The Court also notes that the substantial factor test has been adopted by the Restatement and has been cited with approval by Pennsylvania Courts. Restatement (Second) of Torts §431(A) (1965); Whitner v. Lojeski, 437 Pa. 448, 263 A.2d 889 (Pa. 1970). The Court does not believe it committed error in its charge to the jury, but rather, the charge was in accordance with Pennsylvania law.

The third issue raised by Plaintiff in her Motion for a New Trial is that the Court erred in permitting Plaintiff's previous injury and medical history to be considered by the jury. It is obvious that the key issue of this case was whether the accident of May 1998 caused or exacerbated the injuries claimed by Plaintiff. Plaintiff's preexisting conditions and injuries, which were significantly

6 The Court note also that Plaintiff in her submitted proposed jury questions herself used the term "substantial factor." See Plaintiff's proposed jury verdict slip Question 1, attached hereto. Plaintiff also utilized the term 'substantial factor' in her written proposed jury instructions provided to the Court before trial. See Proposed Instruction No. 2 on burden of proof which stated: "In this case, the Plaintiff has the burden of proving the following propositions: that the Defendant was negligent, and that negligence was a substantial factor in bringing about the accident."

similar to the injuries she was seeking compensation for, were high relevant to sorting out the issues of this case.

Plaintiff's attorney was aware of the importance of this issue and, in fact, on direct examination of Plaintiff he himself elicited testimony from her concerning the following: the automobile accident in Nevada in 1980 where she injured her back and jaw; her migraine headaches in the 1980's which came with her menstrual periods; her problems with more regular migraine headaches in 1989, resulting in nausea and sensitivity to sound and light; and her prescription in 1995 for Prozac to alleviate the migraines.

Further, at the trial deposition on January 14, 2002 of Dr. Stephen Ross, Plaintiff's chief medical witness, Plaintiff's counsel did not object to cross-examination of Dr. Ross by the defense with medical records of her prior medical history.

The Court did not allow any of the prior medical records go out with the jury when they deliberated on their verdict, but the prior medical history of the Plaintiff was relevant to the issues raised in this case and the Court does not believe there was any error in permitting the jury to hear about this evidence. The Plaintiff has not preserved this issue for review since she has not objected to the information until now, and she herself put into evidence her prior medical history and explained the differences between this history and her injuries after the May 23, 1998 accident.

Next, the Plaintiff complains that the Court erred

in allowing the Defendant to file his Answer and New Matter after the jury was selected. It is not disputed that the Defendant filed his Answer and New Matter on March 3, 2003 at the time of jury selection. The trial began on March 6, 2003. The Plaintiff contends the Court erred in not striking the Answer and New Matter as being untimely filed. The Plaintiff claims prejudice because the Answer and New Matter raised the issue that the Plaintiff had limited tort insurance coverage and therefore, she could only obtain damages for pain and suffering if the jury found that she suffered a serious impairment of a body function pursuant to 75 Pa.C.S.A. §1705(d).

The Court reviewed this issue and on March 5, 2003, the Court overruled Plaintiff's objection to the late filing on the record. The Court will rely on its statement made on the record that explains the ruling and is attached to this opinion. The Court notes that there was no prejudice to Plaintiff in the late filing of the Answer and New Matter. Plaintiff was aware long before the filing that the Defendant was raising the limited tort defenses since this defense had been raised and discussed at several prior pretrial conferences. Further, as stated by the Court on the record, the equities of the case were in favor of permitting the late filing. The Defendant was in the United States Military from the time the Complaint was filed until October 2002 when the Defendant returned to the United States. The Defendant's service in the military automatically stayed this case.

Defense counsel only became aware of the Defendant's return to the United States in February 2003, when he informed the Court of his return. Thus, the Court scheduled jury selection for March 3, 2003. March 3, 2003 is the first time defense counsel personally met the Defendant and the Defendant signed the verification to Answer and New Matter on March 3, 2003, the date when defense counsel filed this pleading.

In conclusion, the Court saw no real prejudice to the Plaintiff in permitting the late filing of Defendant's Answer and New Matter. Further, the facts and equities of this case strongly favored the Defendant who should not be penalized for filing his answer late when most of the delay was attributable to his military service to his country.

The final issue raised by Plaintiff is the Court's failure to allow Plaintiff to ask Dr. Olinsky to read a report of Dr. Roeltgen dated December 7, 1998 to the jury. Plaintiff was apparently trying to get before the jury an opinion of Dr. Roeltgen in favor of Plaintiff for the truth of the matter. The Court ruled against Plaintiff on the basis of hearsay, since Dr. Roeltgen could not be cross-examined on this opinion.

The Court does not presently have in its possession the particular report so it cannot further reference it here beyond counsel's descriptions. Defense counsel argues the doctor prepared this report for Progressive Automobile Insurance Company regarding Plaintiff's first party insurance benefits so Dr. Roeltgen could have his medical bills paid.

Whether this is so or not, the offer of the opinion contained in the report was classic hearsay.

While Dr. Roeltgen's medical records were used in cross-examination of Dr. Ross, they were used to document treatment notes in a given period of time (1988-1999), which appeared to be inconsistent with Plaintiff's trial testimony and trial claims. Thus, they were admitted for impeachment, not as substantive evidence.

To the extent that there could be an unfair inference against Plaintiff by calling Dr. Olinsky as a witness (he is partner of Dr. Roeltgen) when Dr. Roeltgen's records were previously used against the Plaintiff in cross-examination of Dr. Ross, the Court cured any such potential harm by allowing Dr. Olinsky to state in his testimony that Dr. Roeltgen's records were consistent with his testimony. N.T., March 6, 2003, at 21-22. Therefore, the Court sees no unfairness to Plaintiff in this matter in not allowing an opinion that was clearly hearsay to be read to the jury.

As the Court sees no merit in any of the issues raised in Plaintiff's Motion for a New Trial, the Motion will be denied.

ORDER

AND NOW, this ____ day of December 2003, the Court DENIES Plaintiff's Motion for a New Trial and DIRECTS the Prothonotary to enter judgment in favor of Defendant and against Plaintiff.

BY THE COURT,

_____
KENNETH D. BROWN, JUDGE

Cc: John Bonner, Esquire
David Smacchi, Esquire
Work File
Gary Weber, Esquire
William Burd, Prothonotary