IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KATI JACOBS, Plaintiff/Appellant,	:	DOCKET NO. 11-00,118
vs.	:	CIVIL ACTION
TINA M. BILBAY, Defendant/Appellee.	:	429 MDA 2013

O P I N I O N
Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

This matter arises out of a rear-end motor vehicle collision that occurred on February 9, 2009, on Market Street in the City of Williamsport, Lycoming County, Pennsylvania. Defendant/Appellee Tina M. Bilbay's vehicle collided with the vehicle of Plaintiff/Appellant Kati Jacobs while Ms. Jacobs was stopped at a red traffic light. Defendant admitted liability for the collision. *See* Answer with New Matter, ¶ 7. From January 28-30, 2013, the Court held a jury trial. On January 30, 2013, the jury returned a verdict with damages being awarded for medical expenses in the amount of $5,500 and for lost earnings in the amount of $2,880.

On February 8, 2013, Plaintiff filed a Motion for Post-Trial Relief. In that motion, Plaintiff alleged that this Court erred in charging the jury on factual cause and by failing to give an exhibit to the jury. Additionally, Plaintiff alleged that the jury's award of past lost earnings and earnings capacity was so contrary to the weight of the evidence that it shocks one's sense of justice. On February 11, 2013, the Court denied Plaintiff's motion. On February 8, 2013, Plaintiff filed a Petition for Delay Damages. Through a stipulation filed on March 4, 2013, the parties resolved Plaintiff's claim for delay damages.

On March 1, 2013, Plaintiff filed her Notice of Appeal with the Lycoming County Prothonotary's Office. On March 5, 2013, the Court ordered Plaintiff to file a concise statement

within twenty-one (21) days. On March 26, 2013, Plaintiff filed her concise statement.[1] In that statement, she raises four (4) issues:

> (1) whether the Court erred by issuing an instruction on factual cause even though Defendant failed to provide evidence that that Plaintiff did not sustain an injury in the collision;
> (2) whether the Court erred by failing to show an exhibit to the jury;
> (3) whether the jury's award of past lost earnings and earnings capacity was contrary to the weight of the evidence; and
> (4) whether the Court erred in denying Plaintiff's motion for post-trial relief.

The Court will address each of these issues in turn.

I. Jury Charge

First, Plaintiff argues that the Court erred giving the "factual cause" jury instruction. The Court does not agree. In *Gillingham v. Consol Energy, Inc.*, 51 A.3d 841 (Pa. Super. Ct. 2011), our Superior Court held that its:

> standard of review when considering the adequacy of jury instruction in a civil case is to determine whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. It is only when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue that the error in a charge will be found to be a sufficient basis for the award of a new trial.

Gillingham, 51 A.3d at 856-57 (citing *Pringle v. Rapaport*, 980 A.2d 159, 165 (Pa. Super. Ct. 2009)). Generally, a trial court is granted wide latitude in choosing the language for its charge. *Gillingham*, 51 A.3d at 857.

In this matter, prior to instructing the jury as to factual cause, the Court gave the following modified admitted negligence charge:

[1] The Court notes that it was not served with the concise statement. *See* Pa. R.A.P. 1925(b)(1).

> [a]s I pointed out in the opening comments I made, and the lawyers have discussed, the Defendant has admitted negligence in causing any injury the Plaintiff may have suffered resulting from the incident in question. Thus, you are required to determine, the amount of damages, both economic and non-economic, to which the Plaintiff is entitled as compensation for such injuries.

Tr. 8-9: 25-6, 1/30/13 (Singer). *See also* CIVIL JURY INSTRUCTIONS, 4th ed., § 13.10. The parties agreed to this modified charge during a pre-trial discussion. After giving the admitted negligence charge and over the objection of Plaintiff, the Court instructed the jury as to factual cause; specifically, the Court provided:

> [i]n order for the Plaintiff to recover in this case the Defendant's negligent conduct must have been a factual cause in bringing about harm. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. To be a factual cause, the conduct must have been an actual, real factor in causing the harm, even if the result is unusual or unexpected.
>
> A factual cause cannot be an imaginary or fanciful factor having no connection, or only an insignificant connection with the harm. To be a factual cause, the defendant's conduct need not be the only factual cause, the fact that other causes concur with the negligence of the defendant in producing an injury does not relieve the Defendant from liability as long as her own negligence is a factual cause of the injuries.

Tr. 9: 7-20, 1/30/13 (Singer). *See also* CIVIL JURY INSTRUCTIONS, 4th ed., § 13.160.

Instantly, Plaintiff argues it was improper for the Court to so instruct the jury on factual cause. However, the Court believed the factual cause instruction to be necessary when explaining the law of the case to the jury; specifically, the Court believed the instruction necessary to explain the special verdict questionnaire that the jury had to fill out during its deliberations. On the special verdict questionnaire, the first two questions pertained to negligence and factual cause. Since Defendant stipulated to liability and causing some injury to

Plaintiff, the Court pre-marked this questionnaire as to include a finding of negligence and factual cause; thus, these issues were not before the jury.[2] However, the fact remains that these questions appeared on the special verdict questionnaire. Thus, the Court determined that it was appropriate to read to the jury the instructions on admitted negligence and factual cause. If these charges were not read to the jury, it would be highly probable that the jury would question the Court regarding these issues sometime during its deliberations simply because the questions appeared on the special verdict questionnaire. Therefore, in order to clarify the law of the case for the jury, the Court decided to read these standard charges during its closing instructions to the jury. In this matter, it was the jury's duty to analyze which of Plaintiff's injuries were caused by the accident. The Court believed the factual cause instruction to be necessary to explain to the jury that Plaintiff should be awarded damages for only those injuries from which Defendant's actions were a factual cause. Lastly, the Court believes that even if the instruction was improperly read to the jury, that this reading, in and of itself, did not cause prejudice to Plaintiff. Based upon these rationales, the Court believes that it did not commit an abuse of discretion or an error of law when it instructed the jury on factual cause.

II. Exhibit

Next, Plaintiff argues that the Court committed an abuse of discretion when it refused to provide a requested exhibit to the jury for its use during deliberations. The Court does not agree. Pa. R.C.P. 223.1 provides the rules for conducting a jury trial; that rule provides:

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[2] In fact, the Court explained the pre-marked special verdict questionnaire to the jury:

> This is a verdict slip that is used in just about all accident cases involving automobiles in the Commonwealth of Pennsylvania, and so what is unusual, and - - and I think the attorneys referred to that, are questions one and two, which you see I have put a checkmark in there to answer t hose questions yes, and that was done by agreement of the parties.
>
> Now where you really will start your deliberations, and where you have to start to think about is question three. State the amount of economic damages sustained by Plaintiff Kati Jacobs as the result of the conduct [of] the Defendant Tina Bilbay….

Tr. 23: 11-20, 1/30/13 (Singer).

(c) The court may

(1) permit specified testimony to be read back to the jury upon the jury's request,

(2) charge the jury at any time during the trial,

(3) make exhibits available to the jury during its deliberations, and

(4) make a written copy of the charge or instructions, or a portion thereof, available to the jury following the oral charge or instructions at the conclusion of evidence for use during its deliberations.

Id. This rule does not require the Court to make exhibits available to the jury during its deliberations, and, therefore, it is within the Court's discretion to determine what exhibits should be permitted to go out with the jury during its deliberations. *Wagner v. York Hospital*, 608 A.2d 496, 503 (Pa. Super. Ct. 1992); *Mineo v. Tancini*, 502 A.2d 1300, 1304 (Pa. Super. Ct. 1986), *aff'd*, 536 A.2d 1323 (Pa. 1988).

The issue that Plaintiff raises in this appeal is whether the Court abused its discretion when it refused to provide the jury with Exhibit B570. In this matter, during the initial hour of jury deliberations, the jury sent its first written question to the Court; this question asked simply "where are the exhibits?" *See* Court, Ex. 1. *See also* Tr. 2:18-19, 1/30/13 (Trimble). The Court brought the jury back into the courtroom and told the jury that the Court had the exhibits; additionally, the Court explained that normally it does not allow the jury to see exhibits during its deliberations. *See* Tr. 2:19-20, 1/30/13 (Trimble). In response to the Court, the foreperson then asked to see exhibit B570 because the foreperson remembered that one of the attorneys wanted the jury to see the exhibit. Tr. 2:23-24, 1/30/13 (Trimble). Upon further explanation, the foreperson said that the jury wanted to see B570 because "[i]t was just in our notes so one of us

made an underlying note that one of these attorneys wanted us to see that so we wanted to make sure we saw what we were asked to see."[3] Tr. 3:10-13, 1/30/13 (Trimble).

Exhibit B570 is a one-page report that was created after Ms. Jacobs visited Dr. Lori Rinker at the Family Medicine Residency Center on October 7, 2009. *See* Ex. B570. *See also* Tr. 3:5-6, 1/30/13 (Trimble). However, when referencing exhibit B570, the Court believed the jury to be asking about a diagram that Plaintiff used throughout the trial, Exhibit C. Tr. 3:3-4, 8-9, 14, 1/30/13 (Trimble). Exhibit C portrayed an epidural injection. The jury did not question the Court's explanation of the exhibit and refusal to let the jury re-examine it; nor did the jury further explain to the Court that it wished to see the record of Ms. Jacob's office visit with Dr. Rinker. In fact, the foreperson referenced exhibit B570 as "[t]he picture you showed us." Tr. 3:7, 1/30/13 (Trimble). Therefore, this leads the Court to believe that the jury had no independent recollection of exhibit B570 when it asked the Court for the exhibit; the Court believes that the jury asked to see the exhibit because some of the jury members had the exhibit number written down in their notes. After the Court released the jury to resume its deliberations, Plaintiff informed the Court that it described the wrong exhibit to the jury. After discussion, the Court refused Plaintiff's request to release exhibit 570 into the jury deliberation room. Tr. 7:5-13, 1/30/13 (Trimble).

When considering the jury's request, the Court took into consideration that the request was based upon some of its members having the exhibit number written down in its notes and not remembering what the exhibit said. Jury members' notes are to be used merely as memory aids. In fact, the Court instructed the jury:

[3] Due to the fact that this trial spanned a number of days, the Court allowed the jury members to take notes pursuant to Pa. R.C.P. 223.2(a)(1).

> [n]ow you took notes in this case, and let me make one final additional comment to you about notes. Some of you have taken notes during the trial. You will be permitted to take your notes with you to the deliberation room. In addition, you are permitted to share your notes with other jurors during your deliberations. Your notes may help you refresh your recollection of testimony, and should be treated as a supplement to, rather than a substitute for your memory. Your notes are merely memory aids. They are not evidence or [the] official record. Those of you who have not taken note are reminded to not be overly influenced by the notes taken by other jurors. Give no more or less weight to the view of a fellow juror just because he or she did or did not take notes.

Tr. 22-23: 14-1, 1/30/13 (Singer). *See also* CIVIL JURY INSTRUCTIONS, 4th ed., § 1.260. The Court denied the jury's request because the jury only asked to see the exhibit because some of the members had the exhibit number written down in their notes. It is clear to the Court that the jury had no independent recollection of the exhibit. Also, the Court noted on the record that it was unsure if the exhibit was either placed before the jury or read to them. Tr. 7:7-8, 1/30/13 (Trimble). Additionally, rarely does the Court allow records of medical professionals to be released to the jury.[4] The Court finds this standard to be particularly true when the doctor whose records were sought to be produced *did not testify* during the jury trial. Therefore, based upon the foregoing, the Court does not believe it abused its discretion in refusing to allow the jury to see exhibit B570.

III. Weight of the Evidence

In this matter, Plaintiff argues that the award of past lost earnings and earnings capacity in the amount of $2,880 was so contrary to the weight of the evidence that a new trial should be awarded in this matter. Plaintiff argues that its vocational expert, William Walker, testified that the minimum that could have been awarded for past lost earnings and earning capacity was

[4] This practice can be seen by the Court's denial of the jury's request to see William Walker's report. Tr. 3:16-25, 1/30/13 (Trimble).

$35,355.84; Plaintiff provides that because this testimony was uncontroverted and supported by Plaintiff's medical expert Dr. Jolly Ombao the jury's award is so contrary to the weight of the evidence as to shock one's sense of justice. The Court does not agree.[5]

In order to be granted a new trial, a jury verdict must be so contrary to the weight of the evidence that the verdict shocks one's sense of justice; a new trial should not be granted merely if there was conflicting testimony presented to the jury. *Nemirovsky v. Nemirovsky*, 776 A.2d 988, 993 (Pa. Super. Ct. 2001). It has long been held that the jury may believe all, part, or none of the testimony presented; the Court so instructs the jury during its closing instructions. *Majczyk v. Oesch*, 789 A.2d 717, 725-26 (Pa. Super. Ct. 2001) (en banc). *See also* CIVIL JURY INSTRUCTIONS, 4th ed., § 4.20. Additionally, a jury need not believe uncontradicted testimony. *See Rose v. Hoover*, 331 A.2d 878, 882 (Pa. Super. Ct. 1974). In *Rose*, our Superior Court addressed a similar issue: whether a jury's verdict as to medical bills and lost wages was against the weight of the evidence; in that case, the Court determined:

> [t]he law is settled, however, that neither a jury nor a judge who sees and hears the witnesses has to believe everything or indeed anything that a plaintiff (or defendant) or his doctor or his witnesses say *even though their testimony is uncontradicted*. The jury could well have concluded that the wage loss claim was not genuine and that the hospitalization and medical expenses were unnecessary: [i]t is the province of the jury to disbelieve all or part of the testimony of the [plaintiff] and [his] witnesses, and thereafter compromise the verdict or so set the amount which it determined would compensate the [plaintiff] for [his] loss.

Id. at 882-83 (citations omitted) (emphasis added). *See also Majczyk*, 789 A.2d at 725.

In this matter, Plaintiff alleged that as a result of the motor vehicle accident, she sustained a soft tissue injury and is unable to work; Defendant conceded that Plaintiff sustained *some*

[5] The Court notes that the jury found in Question No. 4 that Plaintiff's injury was not serious in that it resulted in an impairment of body function, and, therefore, past and future non-economic damages were not permitted.

injuries in the accident. It was for the jury to decide the amount and extent of these injuries and place a monetary value on them. In this matter, the jury did not ignore Plaintiff's soft tissue injury. *See Casselli v. Powlen*, 937 A.2d 1137, 1141 (Pa. Super. Ct. 2007); *Bostanic v. Barker-Barto*, 936 A.2d 1084, 1088-89 (Pa. Super. Ct. 2007); *Hawley v. Donahoo*, 611 A.2d 311, 313-14 (Pa. Super. Ct. 1992).[6] The jury awarded Plaintiff damages in the total amount of $8,380 ($5,500 in medical expenses and $2,880 in past lost wages and earning capacity). Therefore, it is not as though the jury failed to award damages for the Plaintiff's agreed-upon injury; Plaintiff is simply contesting the amount that the jury awarded for this injury.

The Court does not believe the damages verdict rendered by the jury shocks one's sense of justice. The jury was instructed that it could believe all, part, or none of the testimony proffered by Plaintiff's vocational expert William Walker. Mr. Walker testified that he based his vocational and earnings power assessment on *one* of Plaintiff's payroll records and *one* of her W2 forms. Tr. 38:9-14, 1/28/13. Both of these records were derived from Plaintiff's last job; this job being the job she was hired for a few weeks prior to her accident. Tr. 38:15-19, 1/28/13. Additionally, Mr. Walker testified that he did not perform his normal testing on Plaintiff before writing his report. Tr. 9-10:15-15, 38-39:20-2, 1/28/13. When questioned regarding Plaintiff's employment history, Mr. Walker agreed that in the past thirteen (13) years that Plaintiff has had twelve (12) different jobs, some of which were self-employment ventures, and that Mr. Walker did not look at any payment records other than those mentioned of her last employment. Tr. 39:3-22, 1/28/13. *See also* Tr. 21-22:2-16, 23:7-10, 1/28/13. Additionally, Mr. Walker agreed that he had never seen an actual earning record where Plaintiff received $10.00/hour for any type of employment. Tr. 42-43:24-3, 1/28/13. *See also* Tr. 26-27:23-10, 1/28/13 (where Mr. Walker

[6] *Casselli*, *Bostanic*, and *Hawley* stand for the proposition that a jury cannot ignore an injury conceded by Defendant by awarding a verdict of $0 damages.

explains how he reached a $10.00/hour earning capacity for Plaintiff). Therefore, the Court believes that the jury reasonably could have not accepted Mr. Walker's testimony regarding Plaintiff's lost earnings and earnings capacity, regardless of it being uncontradicted.

Additionally, the Court notes that the jury could have based its verdict upon the testimony of defense medical expert Dr. William R. Prebola, Jr. *See generally* Prebola Dep., 1/2/13. Dr. Prebola testified as an expert in physical medicine, rehabilitation and pain medicine, and conservative pain management. *Id*., 8:10-13, 11:14-17, and 12:1-2, Jan. 2, 2013. Dr. Prebola opined that after performing an independent medical examination of Plaintiff it was his opinion that Plaintiff recovered from the injury caused by Defendant, i.e. a cervical strain or a soft tissue injury to the neck. *See id*. 27: 13-14 and 30-31: 22-14. Dr. Prebola testified that Plaintiff has no existing impairment from the accident; in addition, Dr. Prebola concluded that Plaintiff displayed symptom magnification tendencies. *See id*., 21: 1-4, 27-28: 24-7, and 31: 8-14. The Court believes that the jury could have found Dr. Prebola's testimony to be credible and based its verdict on his opinions. Therefore, based upon the testimony of Dr. Prebola, the Court does not believe that the jury's verdict shocks one's sense of justice.

IV. Denial of Post-Trial Relief

Lastly, Plaintiff argues that the Court erred in denying his motion for post-trial relief. The Court does not agree. The issues raised in Plaintiff's post-trial petition are identical to the three (3) issues previously raised in this appeal. Relying on the above analysis, the Court believes that it properly denied Plaintiff's petition for post-trial relief.

For the reasons stated above, the Court respectfully requests our Superior Court's affirmation of the January 30, 2013 Verdict entered in this matter.

BY THE COURT,

_____ _____

Date Richard A. Gray, J.

cc: Michael J. Pisanchyn, Jr. Esq. – 524 Spruce St., Scranton, PA 18503
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