

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| PATRICIA FATTMAN and | : | CIVIL ACTION |
| LEWIS FATTMAN, | : | |
| Plaintiffs | : | |
| | : | |
| v. | : | No. 05-0003 |
| | : | |
| JOHN BEAR, | : | |
| Defendant | : | |

MEMORANDUM AND ORDER

Presently before the Court is a “Motion for New Trial on Damages, or in the Alternative, Motion for New Trial on Liability and Damages” filed by Plaintiffs, Patricia Fattman and Lewis Fattman (“Plaintiffs”), seeking a new jury trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. The motion is opposed by Defendant, John Bear (“Defendant”). For the reasons set forth below, the motion is denied.

I. Procedural History

Plaintiffs commenced this action on January 3, 2005, seeking damages from Defendant for injuries sustained in a motor vehicle accident that occurred in Lancaster County, Pennsylvania, on February 19, 2003. I presided over a jury trial commencing on January 31, 2006, during which Plaintiffs were represented by Michael P. McDonald, Esquire, and Defendant was represented by Daniel T. Lewbart, Esquire. On February 3, 2006, the jury returned a verdict for Plaintiffs on liability, awarded Mrs. Fattman the sum of twenty-five thousand dollars (\$25,000.00) in damages, and awarded Mr. Fattman zero dollars (\$0.00) in damages.

On February 13, 2006, Plaintiffs filed a motion for a new trial on damages and/or liability and damages pursuant to Federal Rule of Civil Procedure 59, which provides in relevant part:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States;

Fed. R. Civ. P. 59(a). On March 27, 2006, Plaintiffs filed a brief in support of their motion for a new trial, and on April 10, 2006, Defendant filed an Answer opposing the motion.

II. Discussion

Plaintiffs argue that a new trial should be granted in this case because the jury verdict was allegedly insufficient on damages, and because the trial court allegedly erred in refusing to permit Mrs. Fattman to testify as to modifications in her employment.

A. Sufficiency of the Verdict on Damages

Plaintiffs first request that a new trial be granted because the jury's verdict on damages was allegedly insufficient. See Br. at 1-9. In support thereof, Plaintiffs argue that the verdict on damages ran contrary to the undisputed and uncontradicted evidence presented at trial, and was thus against the weight of the evidence; and that the verdict was tainted by compromise. See id.

1. Weight of the evidence

Plaintiffs first argue that a new trial is warranted because the jury's verdict on

damages ran contrary to the undisputed and uncontradicted evidence presented at trial, and otherwise ran against the weight of the evidence. See Pl.’s Br. at 2-8. The remedy of a new trial for insufficient damages is only appropriate where the evidence indicates that the jury awarded damages in an amount “substantially less than was unquestionably proven by plaintiff’s uncontradicted and undisputed evidence.” Semper v. Santos, 845 F.2d 1233, 1236 (3d Cir. 1988) (quoting Williams v. Martin Marietta Alumina, Inc., 817 F.2d 1030, 1038 (3d Cir. 1987)). Moreover, a new trial can be granted when a jury verdict is against the weight of the evidence only “where a miscarriage of justice would result if the verdict were to stand.” Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1352 (3d Cir. 1991). The purpose of this requirement is to ensure that the District Court does not replace the jury verdict with one based upon its own interpretation of the facts. Olefins Trading, Inc. v. Han Yang Chem. Corp., 9 F.3d 282, 290 (3d Cir. 1993); see also Lind v. Schenley Industries Inc., 278 F.2d 79, 90 (3d Cir. 1960) (“[T]o the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts”).

Here, Plaintiffs argue that the jury verdict runs counter to the “undisputed” and “uncontradicted” evidence presented at trial. However, the only “undisputed” and “uncontradicted” evidence in the case was that Plaintiff, Mrs. Fattman, suffered injuries in a collision between her vehicle and the vehicle operated by Defendant on February 19, 2003. The extent of the injuries and, more importantly, the impact the injuries had on

Mrs. Fattman's ability to work, were at all times disputed. For example, Plaintiff testified at length about her injuries and the impact of her pain on her career and life, but she also told the jury that she continued to work for her employer for approximately one and a half (1 ½) years after the accident, at which time she was promoted and transferred to Colorado before losing her job in a company downsize. (N.T. 01/31/06, at 71-76, 101). Similarly, although Robert Wolf, Ph.D., Plaintiff's vocational expert, testified that Mrs. Fattman suffered a diminished earning capacity of \$818,022.00, he conceded that Mrs. Fattman had been promoted by her company and that she lost her job as a result of downsizing and not because of the injuries sustained in the motor vehicle accident with Defendant. (N.T. 02/01/06, at 42, 44). Despite Plaintiffs' argument to the contrary, Defendant's decision not to offer his own vocational expert is not determinative. Plaintiffs at all times bore the burden of proof in this case, and it remained at all times the province of the jury to determine how much credit to give to the testimony of Plaintiffs' vocational expert.¹

As for the medical evidence, John Jensen, D.O., Plaintiffs' medical expert, testified that Mrs. Fattman suffered from persistent anterior chest wall pain attributable to the motor vehicle accident, and that the pain was permanent. (Jensen Dep. 10/05/05, at 12-13, 25-28, 49-51). However, although Dr. Jensen referred Mrs. Fattman to a pain

¹Plaintiffs' counsel conceded this point during closing argument, when he reminded the Court that he had withdrawn a proposed jury instruction to the effect that Defendant's failure to provide a vocational expert could be considered by the jury as evidence that Defendant did not contest the testimony of Plaintiffs' vocational expert. (N.T. 2/02/06 at 36-37).

specialist and recommended a bone scan of her chest, Mrs. Fattman did not follow up on the recommendation. (Jensen Dep. 10/05/05, at 55-56). Dr. Jensen also opined that Plaintiff was disabled from her job, but conceded that he did not know what her job responsibilities were. (Jensen Dep. 10/05/05, at 60-62). Meanwhile, Robert A. Smith, M.D., Defendant's medical expert, testified that he could not find anything objectively wrong with Mrs. Fattman at the time of his evaluation, explaining that his diagnosis of costochondritis as a residual of a sternal fracture was based on her subjective complaints only. (Smith Dep. 01/25/06, at 20, 23, 25). Dr. Smith further explained that, in his experience, costochondritis was not a disabling condition. (Smith Dep. 01/25/06, at 33). Moreover, in response to a question by Plaintiff's counsel, Dr. Smith testified that Plaintiff may not have suffered a sternal fracture at all.² (Smith Dep. 01/25/06, at 48).

Under the aforementioned circumstances, the evidence in this case cannot fairly be characterized as "undisputed" and "uncontroverted." To the contrary, the extent of Mrs. Fattman's pain, and the extent her pain impacted her ability to work, were at all times

²The relevant exchange is as follows:

[Mr. McDonald]: Well, that's what you testified to – that it was from a sternal fracture, right?

[Dr. Smith]: What I said was that there was a mention from an emergency note of a possible sternal fracture. There was never anything in the record that I saw at the time that I saw Ms. Fattman that said she definitely had a sternal fracture.

(Smith Dep. 01/25/06, at 48).

disputed issues of fact. As such, the issue of damages was the sole province of the jury, and it was for the jury to decide whether to accept any or all of the testimony of Plaintiffs, Plaintiffs' vocational expert, and the medical experts in this case. Accordingly, the jury verdict will not be disturbed based upon the weight of the evidence.³

2. *Compromised verdict*

Plaintiffs also claim that a new trial is warranted because the jury's verdict was allegedly tainted by compromise, and that a re-trial on this basis should be granted as to both liability and damages. See Pl.'s Br. at 8-9. A "compromised verdict" is one in which the jury compromises between liability and damages by, for example, finding liability on the condition that the amount of damages is reduced. Where a compromised verdict is found or suspected, the proper remedy is to order a retrial on both liability and damages. See Pryer v. C.O. 3 Slavic, 251 F.3d 448, 457 (3d Cir. 2001) ("[W]hen a jury's verdict is obviously the result of a compromise on the questions of liability and damages, it is considered unjust to order a new trial on damages only") (citation omitted).

Here, Plaintiffs argue that the jury verdict finding Defendant liable, but awarding only \$25,000.00 to Mrs. Fattman and zero (\$0.00) to Mr. Fattman, was the result of an

³To the extent Plaintiffs argue that a new trial is warranted because the jury verdict "shocks the conscience," see Semper, 845 F.2d at 1236, I disagree. Courts generally apply the "shock the conscience" test when a verdict is grossly excessive, rather than arguably insufficient, as Plaintiffs maintain in this case. Id. (citing Williams, 817 F.2d at 1038). A jury verdict that may be characterized as unexpected or surprising generally does not rise to the level of offending the conscience of the Court. In any event, as previously explained, I do not find any reason to disturb the jury verdict in this case.

improper jury compromise. In support of this position, Plaintiffs note that at 5:10 p.m., as the jury deliberated in this case, the jury foreperson inquired as to the meaning of a statement on the Verdict Sheet telling the jury that it should not reduce damages by a percentage.⁴ After consultation with counsel (all of whom had previously approved the Verdict Sheet), the Court told the jury to ignore the relevant statement on the Verdict Sheet and explained that any damages amount should be stated by the jury as a gross sum. (N.T. 02/02/06, at 2-7). The jury resumed deliberations at 5:16 p.m. and presented the Court with its verdict shortly thereafter. See id. at 7-8; Pl.'s Br. at 8.

As an initial matter, there is no direct evidence of a jury compromise in this case;

⁴The relevant portion of the Verdict Sheet is as follows:

* * * *

II. Damages

- (A) What amount of damages, if any, will reasonably compensate Plaintiff, Ms. Fattman? (Remember you are not to reduce this number by any percentage)

Proceed to Question II(B)

- (B) What amount of damages, if any, will reasonably compensate Plaintiff, Mr. Fattman? (Remember you are not to reduce this number by any percentage)

* * * *

Verdict Sheet, at 2.

indeed, the jury found both Defendant *and* Mrs. Fattman negligent, but did not find that Plaintiff's negligence was a factual cause of her own harm. In any event, the timeline relied upon by Plaintiffs to suggest jury compromise can be interpreted differently. For example, the jury may have made its determination as to liability and damages and simply sought clarification from the Court as to whether the Verdict Sheet required the jury to do anything further. In light thereof, I find that there is insufficient evidence to support a finding that the jury reached a "compromised verdict" in this case. As such, I will deny Plaintiffs' motion for a retrial on both liability and damages.

B. Testimony as to Modifications in Employment

Plaintiffs also request a new trial on the basis that the trial court erred by not allowing Mrs. Fattman to testify as to modifications to her employment. See Pl.'s Br. at 9-11. When evaluating a motion for a new trial based on trial court error, the Court "must first determine whether an error was made in the court at trial, and then must determine whether that error was so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice." Farra v. Stanley-Bostitch, Inc., 838 F.Supp. 1021, 1026 (E.D. Pa. 1993), aff'd, 31 F.3d 1171 (3d Cir. 1994); see also Honeywell, Inc. v. American Standards Testing Bureau, Inc., 851 F.2d 652, 657 (3d Cir. 1988) (stating, even if error occurred, trial court may deny motion for new trial if it finds it highly probable that moving party's "substantial rights" were not affected); Fed. R. Evid. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a

substantial right of a party is affected”).

Simply stated, the Court did not preclude Mrs. Fattman from testifying as to modifications to her employment. To the contrary, the Court merely prevented Plaintiff’s counsel from asking leading questions – which are generally not permitted on direct examination – and invited counsel to obtain testimony on Plaintiff’s job accommodations by phrasing his questions differently. The following exchange occurred during the direct examination of Mrs. Fattman:

Mr. McDonald: Were any accommodations recommended for you to have you do your job, because of the injuries and the pain that you had?

[Mrs. Fattman]: Yes.

Mr. Lewbart: Objection.

Mr. McDonald: But –

The Court: What’s the basis of the objection?

Mr. Lewbart: It assumes facts not in evidence, your Honor and there’s no – there’s no evidence that – that we’ve been provided with to that effect.

The Court: Also, leading the witness.

Mr. Lewbart: Yes.

The Court: The objection is sustained.

Mr. McDonald: Mrs. Fattman, what accommodations, if any, were made to your job, because of your condition?

Mr. Lewbart: Same objection.

The Court: Objection sustained.

(Pause.)

The Court: Keep trying, Mr. McDonald.

Mr. McDonald: Well, your Honor, I'm trying to – I'm trying to –

The Court: I understand.

Mr. McDonald: Job accommodations – I'm not leading her in that regard.

The Court: Yes, you are.

Mr. McDonald: She's not going to be able to testify as to what accommodations they tried to make to her job?

The Court: Just ask the questions and we'll go on.

Mr. McDonald: All right. Mrs. Fattman, without burdening the Court in any attempt to ask you a proper question, what accommodations, if any, were made to your job, because of your condition?

Mr. Lewbart: Same objection, your Honor.

Mr. McDonald: And my – my response is that it's not – it's not leading, it's an accommodation that she experienced with respect to her job.

The Court: Objection sustained.

Mr. McDonald: Your Honor, just for the record, can I have the basis of – of the Court's ruling in that regard?

The Court: Well, don't show any anger at the rulings, Mr. McDonald.

Mr. McDonald: Oh, no, no, your Honor. I just wanted to know, so I don't ask the question wrong again.

The Court: I can't try it for you.

Mr. McDonald: All right, I – but –

The Court: I know what to ask her.

Mr. McDonald: All right. I – I just wanted to know what the – what the object – what the basis of the ruling is, so I don't question her and continue to do this improperly.

The Court: The same as we expressed before. Objection – and the reason is the same.

Mr. McDonald: All right. Let's move on –

The Court: You might ask her what she did.

Mr. McDonald: Okay, all right. Mrs. Fattman, let's – let's move to a different topic.

(N.T. 01/31/06, at 72-75).

As the trial transcript demonstrates, the Court did not preclude Mrs. Fattman from testifying as to modifications to her employment, but rather sought to avoid improper leading questions of a witness on direct examination. Thus, when counsel for Mrs. Fattman stated that he was “not leading her” regarding job accommodations, the Court replied, “Yes, you are.” (N.T. 01/31/06, at 73). Statements from the bench such as “I know what to ask her” and “You might ask her what she did,” (N.T. 01/31/06, at 74-75), clearly demonstrate the Court's willingness to allow questions regarding Mrs. Fattman's employment modifications, so long as the questions were phrased properly. Finally, it was the decision of Plaintiffs' counsel to move on to a different line of questioning; the

Court did not preclude any testimony or direct that counsel move on.⁵ (N.T. 01/31/06, at 75). Thus, Plaintiffs are not entitled to a new trial on this basis.

III. Conclusion

The jury verdict in this case was not against the weight of the evidence and certainly did not rise to the level of “a miscarriage of justice,” see Williamson, 926 F.2d at 1352, nor is there any evidence of a compromised verdict. Additionally, Plaintiff, Mrs. Fattman, was not precluded from testifying regarding modifications to her employment. Therefore, Plaintiffs’ motion for a new trial on damages, or in the alternative, on liability and damages, will be denied.

An appropriate Order follows.

⁵In any event, the Court’s rulings on defense counsel’s objections during this line of questioning did not impact Plaintiff’s “substantial rights,” see Honeywell, supra. Plaintiff was able to testify as to the days she missed from work, her lack of concentration, her pain medication, and her promotion and transfer with the company. (N.T. 01/31/06, at 71-76, 101). As a result, the jury understood that Plaintiff did not immediately return to her job after the February 2003 motor vehicle accident; that she missed up to 60 days of work between February 2003 and September 2004, due to her injury and pain complaints, but continued to be employed; and that she was transferred to Colorado and promoted in September 2004.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA FATTMAN and
LEWIS FATTMAN,
Plaintiffs

v.

JOHN BEAR,
Defendant

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:
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CIVIL ACTION

No. 05-0003

ORDER

AND NOW, this 8th day of May, 2006, after consideration of Plaintiffs' "Motion for New Trial on Damages, or in the Alternative, Motion for New Trial on Liability and Damages" (No. 68), and Defendant's Response thereto (No. 70), it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

s/Peter B. Scuderi
PETER B. SCUDERI
UNITED STATES MAGISTRATE JUDGE