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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESE HON. NICHOLAS FIGUEROA PART 46

0120441/2001

SULLIVAN, SHARLENE
vs
DRA IMAGING

SEQ 4

VACATE

IO. 120441/01

N DATE 10/6/04

N SEQ. NO. 004

ON CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3, 4
Answering Affidavits — Exhibits	5, 6, 7
Replying Affidavits	8, 9

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

See accompanying decision and order

FILED
APR 06 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/1/05

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

SHARLENE SULLIVAN,

Plaintiff,

-against-

DRA IMAGING, P.C., and
PETER A. LOMBARDOZZI,

Defendants.

Index No. 120441/01

DECISION AND ORDER

Nicholas Figueroa, J.:

Plaintiff moves for an order, pursuant to CPLR §4404, setting aside the verdict in favor of defendants as against the weight of the evidence. Plaintiff alleges that the verdict was not based on a fair interpretation of the evidence and that it resulted from evidentiary errors made by the court.

On July 12, 2000, plaintiff was a front-seat passenger in a motor vehicle when defendant's vehicle hit it on the front passenger side.

Defendant conceded liability; however, in order to recover, plaintiff had the burden of proving that she suffered a serious injury, within the meaning of Insurance Law §5102(d). The interrogatories submitted to the jury asked it to find whether the accident was a substantial factor in causing a coccyx fracture and an L4, L5 facet fracture, and a substantial factor in causing a permanent consequential limitation of use of a body function or system; plaintiff's brain and left knee. The jury answered no to each of the questions. Plaintiff argues that these findings were not based on a fair interpretation of the evidence.

The court refused to submit the question of whether the accident was a substantial factor in causing a medically determined injury that prevented plaintiff from performing substantially all of the material acts constituting her usual and customary daily activities for 90 of the 180 days immediately following the accident. Plaintiff asserts that the court improperly rejected medical testimony that would have proved this theory of recovery and that the court should have allowed the question to go to the jury.

Plaintiff also urges that the court erred in allowing a defense expert, who testified that plaintiff did not suffer a brain injury, to mention the American Academy of Neurologists' 1991 position paper recommending against using position emission tomograph (PET) scans to determine brain injuries. Plaintiff argues that the testimony was hearsay and violated the best evidence rule, as the expert did not produce a copy of the study.

Plaintiff argues that she temporarily lost consciousness and experienced head, back and neck pain immediately after the accident. She submits the emergency medical services report, prepared by an emergency worker who responded to the accident. Plaintiff asserts that these immediate complaints demonstrate that the accident caused her injuries.

Plaintiff also argues that the medical evidence at trial proves that the accident was a substantial factor in causing injuries that qualify as serious injuries under Reinsurance Law §5102(d).

According to plaintiff's expert radiologist, Dr. Kevin Math, a September 5, 2003 computed arial tomogram (CT) scan revealed plaintiff's coccyx fracture. Math testified that the fracture was not congenital; rather, the accident caused it.

Math testified that the accident caused the L4, L5 facet fracture, also visible on the CT scan, as plaintiff had not sustained any lower back injuries, prior to the accident.

Plaintiff, in asserting that the accident caused a permanent, consequential limitation and a significant limitation of her brain, refers to the testimony of two neurologists, Drs. Jason Brown and Monte Buchsbaum. Plaintiff asserts that their testimony shows that she suffered a diffuse brain injury, resulting in a moderate to severe cognitive disorder.

Brown testified that plaintiff scored only an eighty five on an intelligence test. Brown referred plaintiff to the Mount Sinai hospital, where Buchsbaum administered a PET scan.

Buchsbaum testified that the PET scan demonstrated a decrease in plaintiff's brain's ability to utilize glucose in the right temporal parietal lobe. Buchsbaum opined that on a severity scale of one to ten, plaintiff's injury was seven. Plaintiff's cognitive deficits, according to Buchsbaum, resulted from the brain damage.

Plaintiff also refers to the cross examination of defendant's expert, Dr. William Head. Head testified that if plaintiff had only an eighty-five IQ prior to the accident, she could not have had the B plus grade point average she attained as an undergraduate.

Plaintiff's counsel's affirmation, submitted in support of the motion, does not raise any argument about the alleged knee injury.

In arguing that the court erred by not allowing the jury to determine whether plaintiff met the threshold requirement of being unable to perform her usual or customary activities for 90 out of 180 days after the accident, plaintiff argues that the court erroneously curtailed the testimony of a non-treating orthopedist, Dr. William Goldstein.

Plaintiff notes that she graduated from New York University's Tisch School of the Arts in 1989. While in school, she interned on a national television show for six months and was a guest, apparently once, on a radio show. She co-founded, with other Tisch alumni, Torchlight, an organization that encouraged film students and sponsored film festivals. Plaintiff had, at onetime, been a gymnast. Plaintiff sought to elicit testimony about the extent of plaintiff's disability during the 180 day period by asking Goldstein a hypothetical question.

Plaintiff's attorney asked Dr. Goldstein to consider, in forming his opinion, that prior to plaintiff's accident, her activities had included dancing, gymnastics, movie script writing, directing, producing, acting, had been on television and a radio program and had graduated from the Tisch School. He asked Goldstein whether the accident prevented her from performing these activities for 90 out of the 180 days following the accident.

Defendants objected, stating that there was no foundation for the question, as there was no indication that Goldstein was familiar with plaintiff's activities during the 180 day period following the accident. The court sustained the objection. Plaintiff argues that the court erred because it incorrectly believed that such testimony must be elicited from a treating physician.

Plaintiff's final argument is that the court improperly allowed hearsay testimony during Head's testimony. Head testified that PET scans are not an accurate means of diagnosing brain damage. He based this opinion, in part, on a 1991 position paper by the American Academy of Neurologists stating that PET scans are not useful in diagnosing brain injuries.

Head did not bring a copy of the study with him. On cross examination, he conceded that the study was out of date. The Academy, according to Head, is in the process of revising its position on PET scans and plans to issue a new study.

In opposing the motion, defendants refer to Math's cross examination testimony that his fellow radiologists interpreted plaintiff's L4, L5 condition as degenerative hypertrophy. This condition is not caused by trauma, but is a condition that progresses over time and could be expected in a woman of plaintiff's age, especially in light of her prior gymnastic activities.

The testimony by both plaintiff's expert, Goldstein, and defendant's expert, Dr. Maurice Carter, was that if there had been a traumatic fracture of L4, L5, as a result of the accident, the pain would have been exquisite and localized; however, the emergency room treatment records do not indicate such severe, focused pain.

Defendants also argue that the testimony by the medical experts allowed the jury to find that the accident did not cause a coccyx fracture. Math, on cross examination, stated that he could not determine the age of the fracture because there was evidence of degeneration. Goldstein testified that the radiological studies of the coccyx fracture were conflicting, as two studies revealed a normal coccyx. Moreover, Goldstein testified that coccyx fractures ordinarily occur from a vertical impact, not the horizontal impact in the instant case.

Defendants urge that the testimony permitted the jury to determine that the accident did not cause plaintiff to suffer a cognitive deficit. Plaintiff described her post-accident activities that included living alone, evaluating films, giving out awards, contacting casting directors and going on interviews. Plaintiff testified that she traveled to Los Angeles on three occasions. She flew to Las Vegas six weeks after the accident to vacation at a spa. Plaintiff traveled alone and did not have any difficulty in going to the correct gate or timely arriving for her flights. Plaintiff testified coherently and expressively. She described her membership in the Actors Studio as "prestigious and exclusive." Defendants assert that plaintiff's ability to precisely articulate her

accomplishments is inconsistent with severe cognitive damage.

Plaintiff's neurologist, Dr. Brown, conceded that his tests and evaluation were subjective. He was unable to articulate how the accident purportedly changed plaintiff's life.

However, plaintiff's expert, Head, testified that he administered objective tests, including reflex tests. Head's objective findings were inconsistent with brain damage. Head also testified that plaintiff gave improbable responses to his questions. While she was able to read the New York Times and The New York Post, she could not read an eighth grade reader. She claimed that she could not do simple multiplication exercises, such as six times six; however, such inability would only manifest itself in cases of massive brain damage, a condition not present in this case.

Although plaintiff does not raise any arguments in this motion concerning her knee injury, a torn meniscus, defendants argue that the jury properly determined that the accident did not cause this alleged injury. If there had been a knee injury, there would have been swelling, inflamation, redness and bruising. The emergency records give no indication of these later conditions, or of knee pain. Nor is there mention of knee pain in plaintiff's medical records dated July 28, 2000, November 19, 2000, and May 14, 2001. Plaintiff only mentioned pain in October 24, 2000, when she visited the Manhattan Diagnostic and Rehabilitation Center.

Based on the medical testimony, there was a jury question on whether the accident caused plaintiff to suffer fractures, a knee injury and cognitive impairment. The conflicting evidence allowed the jury to conclude, by a fair interpretation of that evidence, that the accident did not cause the alleged injuries. There is no basis, on this record, to interfere with the jury's findings (see *Brown v. Taylor*, 221 AD2d 208).

The court did not err in refusing to submit the question of plaintiff's alleged inability to perform her usual activities for 90 out of 180 days to the jury. The hypothetical question plaintiff attempted to ask Goldstein was not based on his knowledge of plaintiff's routine activities. Rather, it was based on specific events in her past, such as an internship and media appearances many years before the accident. The question, as asked, could not have elicited meaningful testimony about the curtailment of plaintiff's usual and customary activities during the crucial period (see *Jean-Mehu v. Berbele*, 215 AD2d 440). Therefore, it could not have elicited a legally sufficient response on the question of whether plaintiff satisfied the criteria for the 90 out of 180 day threshold requirement (*Toure v. Avis Rent-A-Car*, 98 NY2d 345).

Moreover, the evidence demonstrated that plaintiff's activities were not curtailed during the relevant period. As noted, she made cross country journeys, maintained her home, drove a car and presented film awards. Thus, the evidence was insufficient to show that her activities were curtailed during the crucial period. Based on this evidence, a jury could not, as a matter of law, have found that plaintiff met the 90 out of 180 day threshold requirement, as there was no valid line of reasoning and permissible inferences that could have rationally lead to a finding that plaintiff had been substantially unable to perform her customary activities during that period (see *Cohen v. Hallmark Cards*, 45 NY2d 493, 497; *Licari v. Elliot*, 57 NY2d 230, 236; *Szabo v. XYZ Two Way Radio Taxi Association*, 267 AD2d 134.

The court did not err in allowing Head to testify that he considered the American Academy of Neurology's paper in arriving at his opinion regarding plaintiff's alleged cognitive injury. While Head did not produce the study, hearsay testimony for the limited purpose of giving the jury the basis for an expert's opinion is permissible (see *People v. Palacios*, 302 AD2d

540, 541).

Moreover, Head did not base his opinion solely on the basis of the study. Rather, he examined plaintiff and testified about his own findings. Therefore, as he was not basing his findings on the report of another physician whose report was not in evidence the case plaintiff relies on, *Wagman v. Bradshaw*, 292 AD2nd 84, is inapposite.

In any event, Head testified that the study he mentioned is out of date and would be replaced by a new one. By doing so, he impeached his own testimony. As such, the effect of his reference to the study was harmless.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: April 1, 2005

ENTER

J.S.C.