

**Armstrong v Curran**

2012 NY Slip Op 31325(U)

May 18, 2012

Supreme Court, Wayne County

Docket Number: 72773/2011

Judge: Daniel G. Barrett

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At a term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in Lyons, New York on the 10<sup>th</sup> day of January, 2012.

Present: Honorable Daniel G. Barrett

STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

MANDY M. ARMSTRONG,

Plaintiff

DECISION  
Index No. 72773

-vs-

*2011*

PATRICK L. CURRAN,

Defendant

The Plaintiff, Mandy M. Armstrong, secured a default judgment against the Defendant, Patrick L. Curran, which was reflected in an Order of this Court dated November 10, 2011. An inquest was held on January 10, 2012.

**THE OCCURRENCE OF THE ACCIDENT**

On May 6, 2008, Mandy Armstrong was lawfully operating her 2002 Ford vehicle in the eastbound direction of Route 31 in the Village of Newark. While stopped at the traffic signal governing traffic at the Wal-Mart entrance to Route 31 and wearing her seatbelt, the Plaintiff's vehicle was struck from behind by a 1998 Dodge pick-up owned and operated by the Defendant. Investigating Officer, Deputy G. Lorenz, determined the damage caused to the Plaintiff's vehicle exceeded \$1,000.00. The

Defendant left the scene of the accident without exchanging information with the Plaintiff. The Defendant was subsequently apprehended and later entered a plea of guilty to a felony charge of Driving While Intoxicated.

### **TREATMENT RECEIVED BY PLAINTIFF**

As a result of the motor vehicle collision, the day following the incident Plaintiff was in extreme pain and had difficulty moving. She saw her personal care physician who prescribed Flexeril, Vicodin and chiropractic care. She met with Chiropractor David Sewart on May 13, 2008. She has treated with him on a frequent basis to the present time. In this time frame, she has treated with him over 60 times. On the initial visit she complained of left side pain, headache, upper back pain, and left arm pain. She indicated she could not do laundry and she could not lift blankets. Her range of motion was so compromised that he could not measure it. He performed an orthopedic test - a compression test. This test is performed by rotating the neck and applying pressure from the top down. A positive result was obtained. This means that pain was elicited and was indicative of a soft tissue injury or a compression of a nerve.

A shoulder compression test was also administered. The Plaintiff was seated and her shoulders were compressed. A positive result was obtained which indicated that there was some irritation to the nerves between the neck and the shoulder. Her neck motion was severely limited. Initially ultrasound therapy was administered to help the muscles relax.

On November 7, 2008, she consulted with Dr. David Moorthi from the Advanced Pain Clinic. She reported pain in the left side of her neck as a constant ache that becomes sharp and burning once in awhile. She

described the pain as radiating from the left shoulder to the left finger off and on. She had some numbness in her left hand in addition to occasional weakness in the hand. She rated the pain from 3/10 to 8/10. The pain is intensified by sitting while at work and bending her head down while knitting. She is employed as a 911 operator. Dr. Moorthi noted palpation tenderness over the greater and lesser occipital nerves. Trigger points were noted over the left trapezius and periscapular muscles. It is noted that palpable trigger points may constitute objective medical evidence of a serious injury, (see Santos v Marcellino, 297 A.D. 2d 440, 746 N.Y.S. 2d 111 [2002]) He conducted measurements of the cervical range of motion:

Flexion 40 degrees (50 degrees is normal)  
Extension 40 degrees (60 degrees is normal)  
Rotation to the right 70 degrees (80 degrees is normal)  
Rotation to the left 70 degrees (80 degrees is normal).

On February 3, 2010 Dr. Sewart performs a cervical range of motion with the following results:

Cervical rotation on the right 50 degrees (normal is 60-75 degrees);  
Cervical rotation on the left was 65 degrees; Flexion was 42 degrees and Extension was 43 degrees. They should be around 50 degrees;  
Cervical lateral neck was 20 on the right with pain and 30 on the left with pain. Both of these should be 35 to 40 degrees.

On January 9, 2012 Dr. Sewart performed a range of motion test with the following results:

Cervical rotation on the right 40 degrees (normal is 65-70 degrees);  
Cervical rotation on the left was 55 degrees (normal is 65-70)

degrees); Flexion and Extension were 45 degrees (normal is around 50 degrees); lateral flexion was 30 on the left and right (normal is 35-40 degrees). The compression test was positive on the right and left and she described it as a pinching type of pain. She still has significant palpation tenderness to the muscles attaching to the neck cervical spine, and the upper back. The compression test indicates there is still some type of soft tissue injury between the vertebrae and her shoulder.

Dr. Stewart opined that with a reasonable degree of chiropractic certainty that initially the Plaintiff as a result of the automobile collision of May, 2008 sustained a significant limitation of the movement of her neck. He indicated that she has limited range of motion, particularly in rotation. She still has significant palpation tenderness to the muscles attaching to the neck, the cervical spine, and the upper part of the back. The compression test indicated there is still some kind of soft tissue injury between the vertebrae and her shoulder. He further opined that she has a permanent consequential limitation of the use of her neck. She will require ongoing chiropractic care. He indicates she may require ongoing chiropractic care for an indefinite length of time.

A questionnaire completed by the Plaintiff for Dr. Stewart on January 9, 2012, indicated that her pain intensity was fairly severe. Her sleep is moderately disturbed (2-3 hours sleepless). She cannot read as much as she wants to because of moderate neck pain. Pain prevents her from lifting heavy objects off the floor, but she can manage light to medium weights if they are conveniently positioned. She cannot drive for as long as she wants to because of neck pain. She has moderate headaches which occur frequently.

Her testimony reveals she can only engage in crafts such as sewing, crocheting, knitting and making jewelry for more than one half hour at a time. Also, she can't mop the floor, sweep the floor, or pick up dust for more than half an hour. Her ability to cook and bake has been curtailed because these activities repetitive chopping of ingredients, kneading dough and frosting cakes which aggravate her neck and shoulders. Prior to the accident she would chop firewood. She has been unable to resume this activity.

Prior to the accident she would work out at the gym three or four times a week. Since the accident she has not been able to lift the amount of weight that she had been able to lift nor is she able to work out for as long a period as she was able to do before the accident.

After the accident she worked at the 911 Center handling calls. She was required to wear a headset. She missed time from work because of neck symptoms.

At the present time her neck is never really very good. Sitting in the court she expressed feeling a pinching sensation in her neck.

Prior to the accident she would take her two elementary school children camping every other weekend. Now she takes them camping two or three times a summer. She can no longer ride amusement park rides because it is too jarring for her neck.

The testimony established that the Plaintiff incurred \$336.00 for unreimbursed office visits and \$70 for a chiropractic pillow.

## LEGAL ANALYSIS

Clearly, from the record there is no comparative negligence on behalf of the Plaintiff. The critical issue is whether the Plaintiff has sustained a serious injury as defined by Insurance Law Section 5102(d).

The record reflects that on three different occasions range of motion tests were performed that showed deficits in the cervical spine. In addition, Dr. Sewart performed an orthopedic test- compression test- on his first visit with her in 2008 and in 2012. On both occasions the compression test was positive.

Evidence of range-of-motion limitation, especially when coupled with diagnostic tests, are sufficient to defeat summary judgment. (see Bonilla v. Abdullah, 90 A.D. 3d 466, 933 N.Y.S. 2d 682 [2011], Perl v. Meher 18 N.Y. 3d 208, 936 N.Y.S. 2d 655, 960 N.E. 2d 424 [2011] and Ramos v. Rodriguez, 93 A.D. 3d 473, 940 N.Y.S. 2d 57 [2012]).

It is the finding of this Court that the Plaintiff has sustained a serious injury under the classification of a permanent consequential limitation of the use of her neck.

## DAMAGES

The Plaintiff requests that an award be made for punitive damages. This Court is cognizant of the fact that the Defendant left the scene of the accident in an intoxicated condition. However, the Court finds that the manner in which this accident happened, the Defendant striking the Plaintiff's stopped vehicle, is not in the realm of cases that merits an award of punitive damages.

Damages for past pain and suffering -\$27,500.00;

Damages for future pain and suffering - \$65,000.00;

Damages for out of pocket medical expenses - \$435.00;

Damages for future medical expenses - \$4,200.00;

Punitive/exemplary damages - \$.00.

In addition the Plaintiff is entitled to the statutory costs and disbursements consistent with the CPLR.

This constitutes the Decision of the Court.

Dated: May 18, 2012  
Lyons, New York



Daniel G. Barrett  
Acting Supreme Court Justice

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