Fishburne v State of New York
2014 NY Slip Op 33607(U)
September 5, 2014
Court of Claims
Docket Number: 119146
Judge: Judith A. Hard
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[* 1]

STATE OF NEW YORK COURT OF CLAIMS

JACQUELYN FISHBURNE,

Claimant, DECISION

-v-

THE STATE OF NEW YORK, Claim No. 119146

Defendant.

FILED
OCT - 9 2014
STATE COURT OF CLAIMS
ALBANY, N.Y.

BEFORE: HON. JUDITH A. HARD
Judge of the Court of Claims

APPEARANCES: For Claimant:
Law Offices of David J. Clegg, Esq.
By: David J. Clegg, Esq.

For Defendant:
Hon. Eric T. Schneiderman, NYS Attorney General
By: Joan Matalavage, Assistant Attorney General,
Of Counsel

FACTS

During the evening of August 24, 2010, claimant intended to drive to a friend's house in Kerhonkson, New York. While on Route 209, claimant put on her left-hand turning signal within 500 feet of her friend's driveway. She stopped her vehicle and then proceeded to accelerate at 5-10 mph in order to make the left-hand turn. A vehicle, that was positioned two vehicles behind her, attempted to pass her vehicle on the left-hand side, and collided into her vehicle as she attempted to make the left-hand turn into her friend's driveway.

The vehicle that tried to pass claimant was driven by State Police Sergeant Thomas Fortuna, who was driving an unmarked State vehicle to a correctional facility to retrieve photographs of an assault. According to Sergeant Fortuna, Route 209 is a two lane highway and he attempted to pass claimant using the northbound lane of that highway. He was on a straightaway and the road was level. There was a car in front of him that appeared to be passing claimant on the right or turning into a gas station on the right side of the road. Sergeant Fortuna attempted to pass her on the left. "I didn't see Ms. Fishburne making the left into the driveway, and I couldn't see that she had her directional on. At that point I clipped her front end of her vehicle with the front end of my vehicle" (T: 200).[1] Sergeant Fortuna admitted the accident was his fault (T: 221).

Claimant allegedly sustained a fracture of her right ulnar styloid from this accident (the 2010 accident). In 2006, claimant was in another accident wherein she sustained multiple serious injuries, including an alleged transverse fracture to the right wrist, very close to the injury allegedly sustained in the instant action.

On the night of the 2010 accident, claimant was treated at Ellenville Hospital where an x-ray was taken and her right wrist was wrapped in an ace bandage. She was told to follow-up with an orthopedic physician. Claimant informed the medical staff at Ellenville Hospital that she had a prior fracture to her right wrist. She testified that her only pain from that prior fracture was due to the use of crutches. After the second accident, she awoke the next day with a shooting pain going up her right arm. She went to Kingston Hospital where x-rays were taken and her wrist was re-

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[1] References to the trial transcript are indicated by (T:).

wrapped. Her follow-up appointment was with Dr. Mark Aierstok from Orthopedic Associates of Dutchess County (Dutchess Orthopedics) who diagnosed a wrist fracture and placed a cast on her wrist. When the cast was removed, she started physical therapy. However, her wrist remained painful, so Dr. Aierstok referred her to Dr. Sasha Ristic, a hand and wrist specialist.

Dr. Ristic conducted an EMG study which came back normal, so he suggested arthroscopic surgery to evaluate claimant's wrist. Claimant testified that he "cleared out... some debris" but did not see any torn ligaments in her wrist (T: 107). Claimant returned to physical therapy. The nerves in her wrist were more sensitive and she had some tingling, but otherwise the wrist felt better. However, she experienced more sharp and persistent shooting pains in her forearm and wrist with burning sensations. She testified that the right hand would turn slight red.

Subsequently, she was referred to Dr. Samant Virk, a pain management physician, who prescribed various medications. She found relief through a compound of drugs applied to the skin which she used until she changed insurance carriers.[2] She presently takes Vicodin and Motrin for pain, not only for her wrist, but for other injuries sustained in the first car accident. She also uses a generic form of Bengay. Last year, she received a cortisone shot in her wrist. Her present complaints include a very sharp pain in the webbing of her hand between the thumb and the first digit. These fingers also go numb. She has pain at the point of the break and higher on her forearm. Her wrist cracks upon movement. She has sensitivity to temperature and she wears a wrist brace.

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[2] Claimant's Bill of Particulars ¶ 22 states that "Plaintiffs [sic] medical bills were covered by No Fault Insurance." At trial, claimant's counsel alluded to this cream not being covered by no fault insurance, but no documentation was produced regarding what medical bills were covered or submitted to the no fault insurance carrier.

Claimant, who has a Bachelor of Fine Arts Degree in photography, testified that she now has problems holding a camera. Presently, she is a nude model and hoop dancer.[3] She claims that the second accident has affected her hoop dancing in that she can only do it on pain-free days. She has worked in many places in the United States as a nude model and less frequently in Europe.

John Prochera testified on behalf of claimant. Mr. Prochera is an amateur photographer who has photographed claimant nude doing handstands (Exhibit 19). He testified that claimant required frequent breaks due to pain in her wrist during the photo shoot.

Upon cross-examination, claimant admitted that the Ellenville Hospital records from the evening of the 2010 accident, noted a possible old fracture of the right ulnar styloid. After her wrist was placed in a cast by Dr. Aierstok, she was out of work for nearly 6 weeks. She worked in retail until January of 2011 when she took a job with Bank of America, typing forty hours a week processing tax returns. She worked in graphic arts until November 2012, when she started her career as a nude model.

Dr. Mark Aierstok, claimant's treating general orthopedic physician, testified through a recorded examination before trial (Exhibit 22).[4] He first saw claimant on August 27, 2010 and reviewed her x-ray from the Kingston Hospital emergency room that showed she had a non-

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[3] The Court viewed a video via CD of claimant hoop dancing (Exhibit 19) and various photographs of claimant as a nude model, including a photograph of claimant doing a handstand on her wrists and another photograph of claimant hanging by her wrists from a trapeze bar (Exhibit 19). Hoop dancing entails the use of a mini hoop on her arms and wrists in conjunction with music (T: 129-130).

[4] Dr. Aierstok has an undergraduate degree from the University of Tennessee and a medical degree from East Tennessee State University. His voice was inaudible as to where he completed his residency in orthopedics. He retired from the United States Army as a Major and has been practicing with Dutchess Orthopedics since June 2009.

displaced ulnar styloid fracture of the right wrist (Exhibit 3). On that day, he placed a short arm cast on her right wrist. At the next visit on September 24, 2010, a new x-ray showed that the wrist was healing, so he placed her wrist in a removable splint and told her that she could go back to work on October 4, 2010. He ordered physical therapy for her. At her next office visit on November 16, 2010, she informed him that she was feeling increasing pain. Upon examination, he found that she had full range of motion, was not tender to palpation and was neurovascularly intact. A new x-ray showed that the ulnar styloid fracture had healed (Exhibit 22-F). Attributing the pain to just a post-injury response, he prescribed anti-inflammatory medications. Exhibit 22-A, which is the 2010 x-ray from Ellenville Hospital, shows the transverse fracture of the ulnar styloid that was treated by Dr. Aierstok. Dr. Aierstok testified that the fracture line is completely different than the 2006 fracture which was oblique and at the base of the ulnar styloid and extended into the distal metaphyseal (T: 338/Exhibit 22-D). The 2006 fracture appeared completely healed in the 2010 x-ray. He testified that once a fracture heals it is not susceptible to refracturing. At her next visit on February 14, 2011, she complained of having increasing pain in her wrist. Although she had full range of motion, she had tenderness with ulnar grinds. He thought she could have a secondary tear associated with the fracture so he ordered a MRI and referred her to Dr. Ristic, a hand and wrist specialist.

Although the MRI showed a normal right wrist, Dr. Ristic performed an arthroscopic procedure to her right wrist which found extensive synovitis without a wrist tear.[5] Dr. Ristic ordered an EMG, a nerve conduction study, which was normal. Claimant then commenced

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[5] Dr. Aierstok testified that synovio, the lining of a joint, may become chronically inflamed after an injury. Such condition is termed synovitis.

another round of physical therapy. Dr. Ristic thought Complex Regional Pain Syndrome (CRPS) was an unlikely diagnosis (T: 390/Exhibit 1/October 20, 2011 letter). Dr. Ristic eventually referred claimant to Dr. Virk, a pain management specialist. Dr. Aierstok, although aware of Dr. Ristic's opinion, diagnosed claimant with CRPS, that may not be permanent, and that her pain is attributable to the 2010 motor vehicle accident.[6]

Dr. Virk saw claimant on November 17, 2011 and ordered a triple bone scan at that time which came back unremarkable. Dr. Virk did a physical examination of claimant and found that while her hand strength was limited by pain, there was no temperature difference between the hands, her capillary refill was normal, she had no dysesthesias (impairment of sensation), and there was no allodynia (pain from stimulus). The Court reviewed Dr. Virk's reports from 11/17/11 until 4/26/12 and notes that most of the documents reflect possible CRPS in the assessment portion of the reports (Exhibit 1).

Upon cross-examination, Dr. Aierstok testified that when he examined claimant on August 27, 2010, he was not aware that the Ellenville Hospital records indicated that the ulnar styloid fracture was possibly old. Dr. Aierstok was also not aware of pertinent facts from claimant's medical history. In June 2007, claimant went to Pine Street Pediatrics with complaints of paresthesia in her upper and lower extremities. In August 2008, she went to see her primary

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[6] Counsel for defendant objected to Dr. Aierstok's opinion because he was not the treating physician for this diagnosis (T: 359-360). The Court overrules the objection. Dr. Aierstok is a general orthopedist who, after "[l]ong observation, actual experience and/or study" may qualify to testify about related matters to orthopedics (see, McLamb v Metropolitan Suburban Bus Auth., 139 AD2d 572, 573 [2d Dept 1988]). Further, defendant did not endure any surprise or prejudice regarding his opinion in that the alleged fracture and CRPS have been the crux of this action since its inception (Claim ¶ 5, Claimant's Bill of Particulars ¶¶ 15, 17; see also Hammond v Welsh, 29 AD3d 518 [2d Dept 2006]; Jing Xue Jiang v Dollar Rent a Car, Inc., 91 AD3d 603 [2d Dept 2012]; Finger v Brande, 306 AD2d 104 (1st Dept 2003]; Hamer v City of New York, 106 AD3d 504 [1st Dept 2013]; Breen v Laric Entertainment Corp., 2 AD3d 298 [1st Dept 2003]; Hughes v Webb, 40 AD3d 1035 [2d Dept 2007]).

physician and complained of her right arm going numb intermittently for the last four months. In January 2009, she went to Dutchess Orthopedics and filled out a pain questionnaire indicating that she had pain in both arms from her wrist to her shoulders. In May 2011, she went back to her primary physician and complained of tremors in her right hand that had been going on since 2009. Despite the foregoing, Dr. Aierstok's Affirmation notes that claimant was asymptomatic prior to the 2010 motor vehicle accident and "[a] review of her medical records shows she had no complaints of right wrist pain from 6/5/06 until the date of the collision." (Exhibit 12).

After Dr. Virk, claimant then was treated for pain management by Dr. Richard Dentico of Dutchess Orthopedics from 6/7/12-10/14/13. Claimant saw Dr. Dentico six times and of the six assessments, four were not CRPS.[7]

Dr. Joseph Carfi testified as claimant's expert physician.[8] Dr. Carfi explained that a diagnosis of CRPS entails finding 3 out of 4 criteria: sensory (allodynia, the painful sensation from non-painful stimulus, or hyperesthesia, exaggerated sensation from a source, e.g. cold), vasomotor (temperature or skin color changes in the affected limb), sudomotor (sweating or swelling in the affected limb), and motor (weakness, loss of range of motion, tremors, spasms). He stated that CRPS is a diagnosis of exclusion. He further explained that a bone scan looks for occult fracture or tumors; an MRI looks for structural problems (ligaments, cartilage and occult

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[7] The first and last visit mention CRPS (6/7/12 and 10/14/13) but the remainder of the visits state: no CRPS (10/22/12), De Quervain's tenosynovitis (2/4/13), chronic right wrist pain with hypersensitivity secondary to motor vehicle accident (3/1/13), or possible CRPS (7/23/12) (Exhibit/1 Dutchess Orthopedic Records).

[8] Dr. Carfi has a Bachelor of Science Degree in Biology from the State University of New York at Albany. He has a Master's of Science Degree in Chemistry from Rensselaer Polytechnic Institute. His medical degree is from Mount Sinai School of Medicine. His residency was at the Rusk Institute for Rehabilitation, New York University, in Physical Medicine and Rehabilitation.

fractures); and an EMG assesses potential nerve damage. If these three tests are negative, such results support a finding of CRPS.[9] During his examination of claimant, Dr. Carfi did not find any asymmetry or no unusual vascular patterns in her hands. Her right arm, her dominant arm, was one centimeter less in circumference above the elbow, than the left arm. Her forearms were the same measurement. Her range of motion of the right wrist was less than the range of motion on the left wrist. Her radial deviation movement of the right wrist (bending the wrist toward the thumb) was equivalent. The right grip was stronger than the left grip. Allodynia, a buzzing sensation, was prevalent throughout the right arm. She had an exaggerated sharpness sensation on the right hand and forearm from the use of a safety pin by Dr. Carfi. He opined that claimant suffers from CRPS which is permanent, because she has too much pain without any nerve damage. He did not believe her hoop dancing or still photographs, wherein she utilizes her wrists, affected his diagnosis because with CRPS patients are encouraged to use the affected limbs the best they can with pain.[10]

Upon cross-examination, Dr. Carfi testified that he was not aware that in the Bill of Particulars from the 2006 injury, she listed her then non-displaced fracture of the ulnar styloid as

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[9] Dr. Carfi testified over defendant's objection regarding claimant's physical history and present complaints. The Court agrees with defendant that a non-treating physician cannot testify about claimant's medical complaints (Easley v City of New York, 189 AD2d 599 [1st Dept 1993]; Nissen v Rubin, 121 AD2d 320 [1st Dept 1986]). That portion of Dr. Carfi's testimony is stricken from the record.

[10] Dr. Carfi's testimony regarding the permanency of the alleged CRPS would ordinarily be stricken pursuant to defendant's objection, because claimant failed to submit any documentary proof that she exceeded the amount of no fault coverage (see, Mastrantuono v United States of America, 163 F Supp2d 244 [SDNY 2001][a plaintiff could not recover for economic damages where no documentary proof was proffered that established that she sustained greater than $50,000.00 in basic economic loss]; Rulison v Zanella, 119 AD2d 957 [3d Dept 1986][plaintiffs submitted no proof whatsoever of the economic loss]; Fischer v Luczak, 198 AD2d 474 [2d Dept 1993][medical expenses constitute basic economic loss]).However, defendant stipulated to the admission of Dr. Carfi's Affirmation (Exhibit 13) which contains the estimates for the costs of medications, therapy and adaptive measures to alleviating her pain. Therefore, a ruling on the objection is moot.

a permanent injury. He was aware of some of her first fracture medical history with similar complaints to the 2010 injury (T: 302-303). He was not aware of her recent frequent traveling with her modeling career.

Dr. Robert Hendler testified as an expert for defendant.[11] Dr. Hendler was one of the first surgeons to do orthopedic arthroscopic surgery in the 1970's. He compared the x-ray taken in the emergency room the night of the 2010 accident with the November 16, 2010 x-ray taken at Dutchess Orthopedics that shows a healed fracture (Exhibits 22-B-1 and Exhibit 22-F). He believed that claimant did not have an acute fracture in 2010. He listed the components of CRPS as: (1) an injury; (2) pain is disproportionate to the injury; (3) at one time during treatment there was a finding of swelling, skin discoloration or vasomotor changes; and (4) all other causes have been ruled out. He testified that these criteria are so broad that 50% of his patients could fit into the diagnosis. He examined claimant in November 2012 and found that she had normal range of motion and moisture, color and temperature were normal. There was no atrophy of her hand. She had a normal orthopedic and neurologic examination. He opined that claimant did not have CRPS because his examination did not find any color change, sweating or temperature variation in the affected wrist. There was no bone marrow edema shown in the MRI, the EMG test was normal and the bone scan was normal.[12] He testified that while there were many subjective

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[11] Dr. Hendler obtained a Bachelor's Degree from the University of Pennsylvania and his Medical Doctorate Degree from the University of Nebraska College of Medicine. He completed his internship and residency in orthopedics at the Hospital for Joint Diseases in New York City. He is a Board Certified orthopedic surgeon. He is licensed to practice in New York State.

[12] Claimant's counsel objected to Dr. Hendler's testimony that was not disclosed in his medical report issued pursuant to CPLR 3101 (d). The Court overruled his objection at trial and now sustains that objection as to Dr. Hendler's testimony regarding an undiscovered possible third fracture but maintains its ruling to the extent Dr. Hendler opined that the MRI was normal [no bone marrow edema] (T: 468-469). Exhibit 1, which was stipulated to by counsels, contained the MRI report. Dr. Hendler testified that he discovered this third fracture the weekend before trial while reviewing x-

complaints of pain in the Dutchess Orthopedics records, there was no objective physical finding of CRPS.

LAW AND ANALYSIS

Liability

"To establish a prima facie case of negligence, the plaintiff is required to demonstrate that the defendant owed a duty to him or her, that the defendant breached that duty and that such breach was a proximate cause of the injuries sustained [citations omitted]. . . Once it is determined that a particular duty exists, whether-and the extent to which-that duty was breached and whether any such breach was a proximate cause of the plaintiff's injuries generally are factual issues for the trier of fact to resolve [citations omitted]" (Evarts v Pyro Eng'g, Inc., 117 AD3d 1148, 1150 [3d Dept 2014]). It is clear that Sergeant Fortuna, who was not driving his State vehicle during an emergency at the time of the accident, violated the Vehicle and Traffic Law by not safely passing claimant's vehicle (Vehicle and Traffic Law section 1122). He openly admitted his negligence at trial (T: 221). The Court credits the testimony of claimant that she was slowly proceeding to make the left-hand turn and that she was using her signal. Trooper Fortuna's failure to see her vehicle was a breach of the duty of care that was owed to claimant.

"[W]here the evidence shows several possible reasonable causes for a plaintiff's/claimant's injury and the defendant is not responsible for all of those causes, the plaintiff/claimant cannot recover (citations omitted). Nevertheless, the injured person need not

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rays. All of Dr. Hendler's testimony regarding an alleged third fracture, that was not disclosed until trial, is prejudicial to claimant and is stricken (see Desert Storm Constr. Corp. v SSSS Ltd. Corp., 18 AD3d 421 [2d Dept 2005]; Peguero v 601 Realty Corp., 58 AD3d 556 [1st Dept 2009]; Matter of Bausch and Lomb Contact Lens Solution Prod. Liab. Litig., 87 AD3d 913 [1st Dept 2011]).

refute and exclude remote or technically possible causes of injury, but need merely show that the defendant's negligence and resulting damage can be reasonably inferred (citations omitted)" (White v State of New York, 41 AD3d 1071, 1073 [3d Dept 2007]). In order to establish proximate cause, it is necessary to prove "that it was more likely or more reasonable that the alleged injury was caused by . . . defendant[s]' negligence than by some other agency" (Pipp v Guthrie Clinic, Ltd., 80 AD3d 1014, 1015 [3d Dept 2011], citing Gayle v City of New York, 92 NY2d 936 [1998][internal quotation marks and citations omitted]). That is, "plaintiffs needed only to prove that defendant's negligent act or omission was a substantial factor in bringing about their injuries" (Pipp v Guthrie Clinic, Ltd., 80 AD3d 1014, 1015 [3d Dept 2011], citing Capicchioni v Morrissey, 205 AD2d 959 [3d Dept 1994]).

The Court credits the testimony of Dr. Mark Aierstok to the extent that he found that claimant fractured her wrist as a result of the motor vehicle accident that occurred in August 2010, and that this injury is a different fracture than the fracture of the right wrist in 2006.[13] His testimony was clear in this regard, particularly his explanation of the multitude of x-rays proffered at trial. However, the Court does not credit Dr. Aierstok's testimony that claimant is suffering from CRPS and that such syndrome may be permanent. The opinion testimony on this issue was mixed. While Drs. Aierstok, Carfi and Virk believed claimant suffers from CRPS, Drs. Hendler, Ristic and Dentico (for a majority of his assessments) believed she did not suffer from such syndrome. Therefore, claimant has not sustained her burden of proving that she has CRPS by a preponderance of the proffered medical evidence. The Court comes to this conclusion, in

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[13] With exception of the testimony of Drs. Aierstok and Hendler, the evidence focused on CRPS.

conjunction with the surprising medical record evidence, that she had significant pain, numbness, and tremors prior to 2010. This is contrary to her testimony at trial that the only wrist/arm pain she suffered in 2006 was caused by the use of crutches and Dr. Aierstok's Affirmation that she had no complaints of wrist pain after 2006 until 2010. Further, Dr. Carfi's statement that, "Her condition affects her ability to use her right dominant hand in any strenuous or sustained repetitive way" (Exhibit 13, p 5 of attachment to affirmation) is discounted by the modeling photographs of claimant placing extreme stress on her wrist by executing handstands and hanging by her wrists from a trapeze bar, despite testimony that she needs frequent breaks to do so. The Court concludes that claimant shall be only compensated for the wrist fracture of 2010 and not CRPS.

Damages

A claimant seeking to recover damages for personal injuries sustained in an automobile accident is required to plead and prove that he or she has sustained a "serious injury" as defined in Insurance Law§§ 5102 (d) and 5104 (a) (Licari v Elliott, 57 NY2d 230, 237 [1982]). In order to satisfy the serious injury requirement, claimant must present at trial objective proof of the qualifying injury (Toure v Avis Rent A Car Sys., 98 NY2d 345, 350-351 [2002]). Subjective complaints of pain, alone, are not sufficient (Pianka v Pereira, 24 AD3d 1084 [3d Dept 2005]). Under Insurance Law § 5104 (a), an injured party may recover for non-economic loss (pain and suffering) if claimant sustained a serious injury, which is a "threshold matter separate from the issue of fault" (Reid v Brown, 308 AD2d 331 [1st Dept 2003]) and is "quintessentially an issue of damages", not liability (Van Nostrand v Froehlich, 44 AD3d 54, 60 [2d Dept 2007]). Serious injury includes a fracture (Insurance Law section 5102 [d]). In as much as the Court has credited

the testimony of Dr. Aierstok that claimant suffered a fracture of her right ulnar styloid as a result of the car accident in 2010, the Court awards claimant $30,000.00 for a non-economic loss for her injury

Although claimant could recover for basic economic loss that exceeds $50,000.00, claimant must demonstrate that the alleged loss exceeds the statutory amount of basic economic loss (Rulison v Zanella, 119 AD2d 957 [3d Dept 1986]). Claimant has failed to do so. Claimant offered only Dr. Carfi's testimony and affirmation in support of the costs for the treatment of CRPS and claimant's testimony generally recounting what she spends on a tube of pain cream. Even if the Court were to compensate her for CRPS, claimant did not offer any documentary evidence in terms of receipts or submissions to support that she met the $50,000.00 threshold for basic economic loss.

Upon the review of all the evidence, including the observation of the witnesses and an assessment of their demeanor, the Court awards claimant $30,000.00 for the wrist fracture she sustained as a result of defendant's negligence. The Clerk of the Court is directed to enter judgment in that amount, together with interest from the date of this decision. To the extent claimant has paid a filing fee, it may be recovered pursuant to Court of Claims Act § 11-a (2).

Let judgment be entered accordingly.

Albany, New York
September 5, 2014

Judith A. Hard

JUDITH A. HARD
Judge of the Court of Claims