

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: **Clifton Cann v. Stephen Dunner**
C.A. No. 07C-02-15 RRC

Submitted: November 12, 2008

Decided: November 13, 2008

On Defendant's Motion for Summary Judgment.

GRANTED.

Dear Counsel:

This is a negligence action brought by Plaintiff Clifton Cann against Defendant Stephen Dunner, seeking compensation for soft tissue injuries Plaintiff allegedly sustained in an automobile accident. The issue raised by Defendant's motion for summary judgment is whether Plaintiff may proceed to trial, given the fact that no expert will be called to testify to establish that Plaintiff's claimed injuries were proximately caused by the automobile accident.

For the following reasons Defendant's motion for summary judgment is **GRANTED** .

I. FACTUAL AND PROCEDURAL HISTORY

On November 1, 2005, at about 10:30 a.m. Plaintiff's and Defendant's automobiles collided at the intersection of 28th and Market Streets in Wilmington, Delaware. Plaintiff alleges that Defendant ran a red light, causing the collision. Plaintiff sustained injuries and was transported by ambulance to Wilmington Hospital, where he received medical treatment for injuries to his left knee, left shoulder, neck, and back. All of Plaintiff's injuries were soft tissue injuries—meaning no bruising, lacerations, contusions or fractures were ever identified in the emergency room or thereafter. Plaintiff was prescribed Percocet, Ibuprofen, and Soma. Plaintiff attended physical therapy three times a week for a month and a half and Plaintiff's doctor advised him not to work for three and a half weeks.

Prior to the October 31, 2008 pre-trial conference, Plaintiff failed to produce any expert reports, which were otherwise due by June 2, 2008. Plaintiff's discovery answers identified one medical treatment expert, Dr. Domingo Singson, but with no opinions identified.

For the first time at the October 31, 2008 pre-trial conference Plaintiff notified opposing counsel and the Court that Dr. Singson would not be called as a witness at trial, not even as a treating physician. Plaintiff has identified no other expert witnesses who will testify at trial.

Defendant filed the instant motion for summary judgment immediately after the pre-trial conference.

II. CONTENTIONS OF THE PARTIES

Defendant contends that Plaintiff cannot make a *prima facie* case for negligence because, pursuant to Plaintiff's representation at the pre-trial conference, no expert medical testimony will be offered by Plaintiff. Defendant maintains that expert medical testimony is required to establish causation in the instant case, and, because no expert will testify, Plaintiff fails to establish his *prima facie* case.

In response, Plaintiff contends that expert medical testimony is only required to establish causation when the matter at issue is one which is only understood by experts with special skill and training in the subject. Thus, Plaintiff maintains, not all actions based on negligence require expert

medical testimony and because the facts of the case at bar are within the understanding of lay persons, expert testimony is not necessary.

III. STANDARD OF REVIEW

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹ Although the moving party has the burden of demonstrating that no material issues of fact are in dispute and it is entitled to judgment as a matter of law, the facts must be viewed “in the light most favorable to the nonmoving party.”²

IV. DISCUSSION

The issue before the Court is whether expert testimony is necessary to establish causation in a negligence case, where the Plaintiff sustained soft tissue injuries in an automobile accident.

In *Money v. Manville Corp. Asbestos Disease Co. Trust Fund*, a case discussed by both parties, the Delaware Supreme Court set forth the standard for determining when expert opinion is required in a tort case.³ Citing *Prosser and Keeton on the Law of Torts*,⁴ the *Money* court noted, “When the issue of proximate cause is presented in a context which is not a matter of common knowledge, expert testimony may provide a sufficient basis for a finding of causation, but in the absence of such testimony it may not be made.”⁵

¹ Super. Ct. Civ. R. 56(c).

² *Mason v. United Servs. Auto. Ass'n*, 697 A.2d 388, 392 (Del. 1997) (“a party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party”).

³ *Money v. Manville Corp. Asbestos Disease Co. Trust Fund*, 596 A.2d 1372 (Del. 1991).

⁴ *Prosser and Keeton on the Law of Torts* § 269 (5th ed. 1984).

⁵ *Id.* at 1376.

More recently, in *Rayfield v. Power*, the Delaware Supreme Court dealt directly with the issue of whether expert medical testimony was needed in a negligence action stemming from an automobile accident.⁶ The plaintiffs had sought damages for personal injuries arising from an automobile accident in which the defendant allegedly failed to yield the right of way while making a left-hand turn. In affirming the Superior Court's order granting summary judgment because the plaintiffs failed to offer any expert medical testimony in support of their claim for damages, the *Rayfield* court explained:

In order to survive the [defendants'] motion for summary judgment, the [plaintiffs] were required to adequately establish all the elements essential to their case that they would have the burden of proving at trial. In Delaware, in order to prevail in a negligence action, a plaintiff must prove by a preponderance of the evidence that the defendant's action breached a duty of care in a way that proximately caused injury to the plaintiff. *With a claim for bodily injuries, the causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injury must be proven by the direct testimony of a competent medical expert.*⁷

Even more recently, this Court granted a motion for summary judgment in a factually similar case. In *Sluss v. Davis*, the plaintiff was "excluded from offering any expert medical testimony at trial as to the plaintiff's injuries from the [automobile] accident, including any opinions as to diagnosis, causation, or permanency"⁸ because the plaintiff failed to produce any expert reports by the court's deadlines. This Court rejected the plaintiff's argument that a lay person could establish the connection between the accident and the plaintiff's injuries and concluded that because the plaintiff was unable to present expert medical testimony, he could not establish the element of causation necessary for a *prima facie* showing of negligence.⁹

In the instant case, the nature of Plaintiff's injuries must be noted. Plaintiff's injuries are exclusively soft tissue injuries. Unlike a fracture or laceration, a soft tissue injury cannot be seen by the naked eye. Soft tissue

⁶ *Rayfield v. Power*, 840 A.2d 642 (Del. 2003).

⁷ *Id.* at *1 (emphasis added).

⁸ *Sluss v. Davis*, 2006 WL 2846387, *1 (Del. Super. 2006).

⁹ *Id.*

injuries may be caused by a number of activities or prior occurrences. Thus, expert medical testimony is necessary to connect the defendant's negligence with the plaintiff's injuries in this particular case.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary