

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

MYRNA SANCHEZ AND
JUAN SANCHEZ,

Plaintiffs,

v.

KEITH D. BOYKIN,

Defendant.

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C.A. No. 07C-07-161 WCC

Submitted: October 6, 2009
Decided: December 30, 2009

MEMORANDUM OPINION

**Upon Plaintiff's Motion for New Trial -DENIED
Upon Plaintiff's Motion for Additur - GRANTED**

Bernard J. McFadden, Esquire; Green, Green, Godowsky & McFadden, 1200 Pennsylvania Avenue, Suite 303, Wilmington, DE 19806. Attorney for Plaintiffs.

James J. Haley, Jr., Esquire; Ferrara, Haley, Bevis & Collins, 1716 Wawaset Street, P.O. Box 188, Wilmington, DE 19899-0188. Attorney for Defendant.

CARPENTER, J.

This case involved a claim for personal injuries and a claim for loss of consortium relating to an automobile accident that occurred on July 21, 2005. Defendant Boykin admitted liability for the accident, and a trial was conducted on August 31 - September 2, 2009 to resolve the issue of damages to both Mr. and Mrs. Sanchez. The jury was asked to determine whether Mrs. Myrna Sanchez's alleged injuries were proximately caused by the accident, and if so, the amount of those damages as well as Mr. Sanchez's consortium claim. The jury returned a verdict on September 2, 2009 and awarded no damages to either Plaintiffs. Plaintiffs have filed this Motion for a New Trial and/or Additur.

While it is within the Court's discretion to alter or amend a judgment,¹ the jury hears the evidence and determines the credibility of witnesses, and their decisions are accorded significant weight and deference. As such, in "the face of any reasonable difference of opinion, courts will yield to the jury's decision."² However, the Delaware Supreme Court has ruled that "where medical experts present *uncontradicted* evidence of injury, confirmed by objective medical tests supporting a plaintiff's subjective testimony about her injuries and offer opinions that the injuries relate to the accident about which the plaintiff complains, a jury award of zero damages is against the weight of the evidence."³ A MRI, an X-ray,

¹ Super. Ct. Civ. R. 59.

² *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1996) (citing Del. Const. art. IV, §11(1)(a)).

³ *Burkett-Wood v. Haines*, 906 A.2d 756, 765 (Del. 2006) (quoting *Amalfitano v. Baker*, 794 A.2d 575, 576 (Del. 2001)).

and spasm revealed on palpation to a physical examination are considered objective medical evidence in this jurisdiction.⁴ It is within this context that the jury's decision will be reviewed.

Immediately following the motor vehicle accident, Mrs. Sanchez was self-admitted into Christiana Hospital Emergency Room. The emergency room report states that she suffered from muscle strains of the neck and possible muscle spasms. Four days after the accident, Mrs. Sanchez sought additional care from Dr. Carmen Garcia, a physician who had previously treated the Plaintiff for a work related lower back injury.⁵ Despite periodic notes relating to the mid or low back, it appears that Dr. Garcia's primary treatment was for the pain in Mrs. Sanchez's neck and shoulder area. Dr. Garcia's examinations confirmed a strain and muscle spasms to Mrs. Sanchez's neck and shoulder area and it appears these conditions had resolved by October of 2005.

Aside from these periodic notations in Dr. Garcia's notes, there was no evidence that Mrs. Sanchez received treatment for her back until February 2006 – almost seven months after the accident. At that time, she begins consulting with several doctors specifically seeking treatment for back pains which ultimately led to surgery in June of 2006. However, the records show disparities as to when Mrs.

⁴ *Burkett-Wood*, 906 A.2d at 766 (Del. 2006).

⁵ The work related injury occurred in 1992 with surgery in 1993. She suffered a permanent impairment of her low back of 10%.

Sanchez believed the pain first started and whether the accident was the cause of her back and leg pains that started in February 2006. Other than Mrs. Sanchez's subjective belief that the February 2006 back and leg pains were the result of the car accident, there is lack of any objective proof that such was actually the case.

The medical testimony also failed to provide an objective conclusive determination that Mrs. Sanchez's injuries to her low back and right leg were a result of the accident. The Plaintiff's expert, Dr. Koyfman, testified as follows:

Q. And in your narrative report of October of 2006 what conclusions did you have about [Mrs. Sanchez's] injuries and the causation of those injuries?

A. My conclusion was that the patient with previous history of low back problems and previous surgery with displacement of L4, 5 disk recovered pretty well from initial surgery and she was free of discomfort until the accident she was involved in. Then, she failed conservative therapy and continued having lower back pain and right leg pain and surgery was indicated and she was operated on and I thought it was successful procedure. I thought at that time and I believe now that the triggering event for her new problems with lower back and right leg was motor vehicle accident.

Q. Is it your opinion Doctor, that the surgery that you performed in June of 2006 was proximately caused by the injuries sustained in the accident of July of 2005?

A. Yes, I do believe so.⁶

In contrast, the Defendant's expert, Dr. Fedder, stated:

Q. Okay. Doctor, based on this record review and any other sources, what was your conclusion about the low back condition and surgery that Ms. Sanchez had in – in '06?

A. Well, I felt the surgery that she underwent in 2006 was related to a right lower extremity radiculopathy that started in roughly February 2006. I was unable to link the onset of right lower extremity radicular pain to the motor vehicle accident of July of 2005, based on multiple mutually corroborating

⁶ Koyfman Test. 18:16-19:13, Mar. 19, 2009.

notes and also the date of the MRI of April of 2006, and the – I believe there was an EMG in 2006 as well in April.⁷

Later in Dr. Fedder's testimony:

Q. Doctor, in your opinion, can you explain the onset or what happened to Ms. Sanchez in '06 that led to this surgery she had in June of '06?

A. Oh, certainly. As I indicated, irrespective of whether a person has surgery in the past or low back issues in the past, the anatomy is still similar and involves a tough fibrous casing surrounding gelatinous material in the form of a nucleus pulposus or disc. Rents or fissures in the annulus are fairly common, and this presents a pathway or an egress route for the disc material to squirt out to, so to speak, and I'm sure that's what happened here.

Q. And was it caused by the collision that occurred back in July of '05?

A. No. If she had experienced a traumatic disc herniation, she would have had symptoms in the radicular distribution right away. Generally, collisions of sufficient force to cause traumatic disc herniations are also accompanied by substantial systemic injuries. Fortunately that did not occur here.⁸

As the above medical testimony illustrates, the experts disagreed as to whether Mrs. Sanchez's lower back injuries had any relationship to the accident. As such, the assessment of the credibility of the doctors' testimony and which the jury believed was more convincing was within their discretion to decide and will not be disturbed.

However, it does appear that both medical experts agree that Mrs. Sanchez sustained neck and shoulder injuries as a result of the accident and that those injuries had fully healed by October of 2005.⁹ In addition, their findings are

⁷ Fedder Test. 23:11-24, Mar. 23, 2009.

⁸ Fedder Test. 26:1-22, Mar. 23, 2009.

⁹ Koyfman Test. 32:12-17 Mar. 19, 2009; Fedder Test. 27:7-22, Mar. 23, 2009.

supported by objective medical testimony. It is within this context that the Court believes some damage award is required.

In *Willey v. McCormick*, 2003 WL 22803925, at *3-4 (Del. Super. Nov. 13, 2003), the Court held that the jury was required to return a verdict of at least minimal damages when the plaintiff's subjective complaints of neck pain following the accident was confirmed by the emergency ward doctor's physical examination of the plaintiff which showed muscle spasms and decreased range of motion in the neck. Similar to *Willey*, Mrs. Sanchez's subjective complaints of neck pain following the accident were supported by the emergency room doctor's physical examination of Mrs. Sanchez who indicated neck strains and Dr. Garcia's records showing spasms in the neck and shoulder area. While these injuries were resolved by October 2005, the Court finds that the jury's award of no damages is against the weight of the evidence. The Plaintiff presented uncontradicted objective medical testimony that mandates some monetary award for these injuries.

During the time Mrs. Sanchez experienced her neck and shoulder injuries, Mrs. Sanchez was covered under Delaware's no-fault insurance policy, "PIP." PIP pays an individual's medical bills and lost wages up to the extent of the individual's coverage when an individual in an accident is injured. There is no monetary recovery for medical bills incurred during PIP pay out periods. However, what can be recovered during this PIP period is compensation for Mrs.

Sanchez's pain and suffering for the neck and shoulder injuries incurred as a result of the accident. Therefore, the Court finds that ordering an additur of \$6,000 to Mrs. Sanchez for pain and suffering is appropriate.

With regard to Mr. Sanchez's loss of consortium claim, the Court will not disturb the jury's verdict. Because the jury hears the evidence and determines creditability as to witnesses, the jury was the best finders of fact to determine the amount of damages Mr. Sanchez suffered as a result of Mrs. Sanchez's accident.¹⁰

Conclusion

Therefore, the Court finds it appropriate in this case to grant Mrs. Sanchez an additur of \$6,000 and sustain the no damage award to Mr. Sanchez.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

¹⁰ See *Bradshaw v. Trover*, 1999 WL 1427770 (Del. Super. Oct. 27, 1999).