Submitted: August 20, 2001
Decided: August 29, 2001

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Re: *Jelani McCoy v. William D. Whisler, Jr. v. Sheena Hackett*
Civil Action No. 99C-03-277 ~~JRJ~~ SCD

Dear Counsel:

Plaintiff McCoy ("McCoy") was a passenger in an automobile driven by his then-girlfriend, third-party defendant Sheena Hackett ("Hackett"), when the vehicle they occupied was struck from the rear by a vehicle occupied by defendant William Whisler, Jr. ("Whisler"). Defendant Whisler was legally intoxicated at the time of the accident. I found as a matter of law that Whisler was negligent, and left for the jury the question of proximate cause.

Both plaintiff and defendant presented expert testimony to support their conclusions regarding the sequence of events leading up to the accident. Certain facts were not in dispute. The accident occurred after the Hackett vehicle entered onto the highway on which Whisler was already travelling. Hackett moved from a stopped position, into the right lane of the highway and then into the left lane of the highway. There was a dispute as to the exact position of the vehicles in the lanes when the collision occurred, but clearly Hackett was not entirely within the right lane. Also clear is the fact that Hackett did not see the Whisler vehicle in spite of the fact that she would have a clear view. There were no other vehicles in the vicinity when the accident occurred. The defendant left approximately 80 feet of skid marks, most, if not all, before the collision.

The plaintiff has filed a motion for new trial. He justifies his motion with the following arguments:

- That the verdict is against the weight of the evidence.
- That the verdict of no proximate cause was premised solely upon the testimony of Dr. Govatos, which was based on an incorrect foundation.
- That the Court erred in permitting Dr. Govatos and defendant Whisler to testify that the vehicle airbag did not deploy.
- That sympathy for the defendant Whisler was improperly injected in the case when he testified that he began drinking on the evening in question because he had been diagnosed with prostate cancer.

Defendant Whisler responds:

- That the verdict is supported by the evidence.
- That Dr. Govatos' testimony was based on the facts, and logical inferences from those facts.
- That the testimony regarding the airbag was offered to demonstrate that Dr. Govatos' accident reconstruction conclusions were consistent with the non-deployment of an airbag because the impact did not cause enough change in velocity for the air bag to deploy.
- That there was no objection to Mr. Whisler's testimony regarding cancer, and there was no prejudice because the Court ruled as a matter of law that Whisler was intoxicated and negligent, leaving only proximate cause for the jury to decide.

Third-party defendant generally opposes the motion.

As to plaintiff's first argument, there was sufficient evidence, in fact, compelling evidence, from which the jury could conclude that the proximate cause of the accident was the negligence of Hackett in that she moved from the entry lane, into the right lane of travel, and into the left lane of

travel, without seeing the defendant's vehicle, and in a short distance. That conclusion is supported by the evidence, in spite of the fact that defendant was negligent as a matter of law due to his intoxication, because his capacity to drive was demonstrated by the evidence that he recognized the hazard and reacted in order to leave lengthy skid marks.

The testimony regarding the air bag not deploying was permitted only after Dr. Govatos had testified that the fact had relevance to his conclusions. The testimony was admitted with a limiting instruction directing the jury that it could be used only as it relates to the weight given the testimony of the Doctor, and not as it might pertain to any claim of injuries.

As to the claim of prejudicial sympathy associated with the defendant's testimony that he had prostate cancer, I find no basis there for a new trial for several reasons. There was no objection. The plaintiff effectively cross-examined the defendant on the fact that the "explanation" for his conduct had not been revealed at the time of his deposition. No limiting instruction was requested. Given the healthy appearance of the defendant at trial, and the fact that trial was nearly four years after the accident of October 13, 1997, I do not find any possibility of prejudice as a result of that testimony.

The jury's verdict was fully supported by the evidence. There was no legal error. The motion for new trial is DENIED.

Defendant has also sought an award of costs. No opposition has been filed. I will GRANT the fee for expert testimony, $1,595.00 for Dr. Phoon and Dr. Govatos combined. The videotaping fees are DENIED.

IT IS SO ORDERED.

Very truly yours,

Susan C. Del Pesco

SCD/msg
Original to Prothonotary

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