

Submitted: March 12, 2001
Decided: May 9, 2001

Michael C. Heyden, Esquire
1201 King St.
Wilmington, DE 19801

James J. Haley, Jr., Esquire
Ferrara, Haley, Bevis & Solomon, P.A.
1716 Wawaset Street
P.O. Box 188
Wilmington, DE 19899

Re: *Edward Thomas v. John J. Beaudet*
Civil Action No. 98C-09-084 SCD

Dear Counsel:

This claim arises out of an automobile accident which occurred on October 29, 1997, on Route 13 in Hares Corner, New Castle County, Delaware. The plaintiff was on his lunch break, travelling south on Route 13. He was waiting for traffic to clear so he could make a left turn. He testified that he stopped in the turning lane, then moved a little bit forward, then stopped again when he was hit from the rear. After a considerable delay waiting for the police, and eventual trip to the near-by police station to report the incident, he returned to work at the post office. He left after a couple hours because of the pain in his neck and left shoulder. He had cervical and left shoulder x-rays in November 1997. The report showed a mild curvature of the cervical spine to the left, but an otherwise normal study; and mild degenerative changes to the left shoulder. An MRI of the cervical spine done in December 1997, showed a right paracentral disc hernia ion with spurring at C3-4, and a disc bulge at C2-3, also with spurring. Neither positive finding was accompanied by evidence of cord compression. Both medical reports were admitted in evidence.

The plaintiff was out of work until February 1998 when he returned on light duty. He returned to full duty on March 9, 1998, doing the same work as he did before the accident. Thomas testified that he had worked regularly since his return to work, with only occasional absences, and had not treated between December 1998 and December 2000 when he returned to his treating physician. That physician, Dr. Sternberg, opined that the plaintiff had received a permanent injury to the shoulder as a result of the accident. The plaintiff testified that he did not do the home exercises prescribed by the physician, and preferred to endure the pain he reported rather than receive the injections offered by the physician.

The testimony of Dr. Sternberg was countered by the testimony of Dr. Wapner who had seen the plaintiff in February, 1998, shortly before he returned to work. Based on that examination he concluded that the plaintiff had suffered a musculoligamentous injury of the neck and upper back as well as a bruise of the left shoulder as a result of the accident. He found that the plaintiff was much improved at the time he examined him, and expected that he would fully recover. He did not recommend any further treatment, except home exercises. He also testified that the herniated discs revealed by the MRI were not related to his complaints; the complaints associated with herniated discs being radiating pain, numbness, tingling, and weakness which were not reported by the plaintiff.

The photographs of the vehicles demonstrated that the collision was at an angle, with the damage to the vehicle the plaintiff was driving limited to the far left rear of the vehicle, principally the tail light. The defendant admitted responsibility for the accident. The only issue before the jury was the nature and extent of the plaintiff's injuries. The jury returned a verdict of \$1,000.00.

The plaintiff seeks a new trial or additur. He argues that the Court erred in instructing the jury on pre-existing injury¹ because the evidence did not support such an instruction. He further argues that the note from the jury indicates that there was confusion. The pertinent part of the note said:

If we find that Mr. Beaudet's vehicle striking Mr. Thomas' vehicle was the "proximate cause" of Mr. Thomas' injury(es)--thereby meeting the burden of proof--do we have award damages for pain and suffering? We recognize that he experienced pain as a result of the accident, but we do not feel that this was an injury that this was ongoing issue.

There was also a credibility issue introduced into the case through the testimony of the defendant. After the accident occurred, the defendant approached the plaintiff and they

¹The instruction stated:

Preexisting or Independent Condition

A party is not entitled to recover any damages for pain and suffering, or other alleged injuries, not caused by John Beaudet. Therefore, if you find that Edward Thomas had the injuries for which he claims here before the accident or apart from the accident, then I instruct you that for the portion of the injuries that you find were not caused by the accident, there can be no recovery by Edward Thomas.

pulled off the roadway. The plaintiff and two others who were in the vehicle he was driving waited for the policeman who did not appear. The plaintiff went back to work to report the accident, returned to the scene, then went with the defendant to the police station to report the accident. In short, the plaintiff and the defendant were in the company of one another for an extended period of time. The defendant agreed with the plaintiff that the plaintiff had said he was alright, but denied that the plaintiff ever said he was "shook up." The defendant also denied that there was damage to the drivers side window of the vehicle, which was reported by the plaintiff.

The evidence supports the instruction regarding preexisting or independent condition because it is clear that such a condition existed. The plaintiff argued that the herniations were caused by the accident; the defendant presented evidence to the contrary, indicating that the herniations pre-existed or were unrelated to the accident. The inference from the jury note was that the jury concluded that the plaintiff had sustained an musculoligamentous injury of limited duration. The jury was informed that all of the plaintiffs medical expenses and lost wages were paid, so there were no special damages for the jury to consider.

The case boils down to a question of whether the jury's verdict of \$1,000.00 was insufficient. I conclude that it was not given the opportunity for the jury to reject some or all of the allegations of subjective pain. The verdict is not against the great weight of the evidence.

The motion for a New Trial or Additur is DENIED.

There are cross-motions for costs pending. The plaintiff seeks and is entitled to the court-related costs which pre-date the offer of judgment filed on January 17, 2001. The defendant is not entitled to an award of costs because it did not prevail in the litigation--the plaintiff did recover.

Judgment is entered in plaintiff's favor for \$380.00 as costs of the proceeding.

IT IS SO ORDERED.

Very truly yours,

Susan C. Del Pesco

SCD/msg

²*Storey v. Camper*, Del. Supr., 401 A.2d 458, 465 (1979).

³The offer of judgment was \$2,500.00.

Civil Action No. 98C-09-084 SCD
May 9, 2001
Page 4

Original to Prothonotary