

[Cite as *Gorslene v. Ohio Dept. of Transp.*, 2022-Ohio-3377.]

CONNIE F. GORSLENE, Exec., etc.

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION, et al.

Defendants

Case No. 2016-00708JD

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

{¶1} Plaintiff, Rex A. Gorslene (Gorslene), brought this action for negligence arising from a September 29, 2014 accident in which an employee of defendant, Ohio Department of Transportation (ODOT), driving a vehicle in reverse gear in the construction zone where Gorslene was at work, struck and injured him. The issues of liability and damages were bifurcated and the case proceeded to trial before the magistrate on the issue of liability. The magistrate recommended judgment for Gorslene on the issue of liability. The court adopted the magistrate's decision and rendered judgment accordingly. Thereafter, the case proceeded to trial before the magistrate on the issue of damages.

{¶2} Following the trial on the issue of damages, counsel for plaintiffs filed a suggestion of death for Gorslene pursuant to Civ.R. 25(E), followed by a motion to substitute Connie F. Gorslene, Executor of the Estate of Rex Gorslene, as the proper party pursuant to Civ.R. 25(A), which is GRANTED. The caption shall read as set out above. All other pending motions are DENIED as moot.

{¶3} At the damages phase of trial, Gorslene, who was born in 1969, testified about his work history, beginning with a job he had with the state of Ohio from about 1988 to 1992, working at the Columbus Developmental Center with developmentally disabled patients. Gorslene stated that in 1988 he sustained knee and head injuries in an automobile accident while transporting a patient, causing him to miss about a year of

work, during which time he received benefits from the Bureau of Workers' Compensation (BWC). As Gorslene recounted, although he was able to return to full-time work, his BWC claim remained open until 2010.

{¶4} Gorslene explained that he left the state job to transition into construction work, starting with asphalt paving, and eventually he joined a laborers' union and got into heavier work such as digging ditches and laying pipe. Although he could not recall the exact timeframe, Gorslene recounted working for several years at Decker Construction, where he performed various road construction tasks, and after some time he joined the operating engineers' union and mainly ran a paver machine.

{¶5} At the time of the accident in 2014, Gorslene stated, he had been working for Double Z Construction for 10 or 11 years, performing all manner of road construction work. Among other things, Gorslene stated that he operated all kinds of equipment and machinery such as bulldozers and backhoes, he set up traffic controls, laid pipe, shoveled and raked stone, laid and rolled asphalt, and did various concrete work and bridge work; as he put it, he did everything in road construction except operate cranes.

{¶6} Gorslene acknowledged having dealt with some maladies and bodily pain over the years, predating the 2014 accident. For example, Gorslene described tearing the meniscus in his right knee and having to undergo surgery due to a work injury. Gorslene testified about medical records from February 2001 relating to complaints of increased low back pain, attributed to his 1988 accident. (Exhibit A, p. 738.) Medical records from 2001 show that Gorslene received a series of trigger point injections in his lumbar spine, but it provided little benefit and he continued to complain of neck and low back pain. (*Id.*, p. 721.) Gorslene testified that he could not recall how often he received trigger point injections, but he acknowledged reporting at the time of this visit in 2001 that his pain symptoms had been ongoing for 13 years.

{¶7} As Gorslene acknowledged, during a medical examination in 2009, he reported back, knee, and neck pain which he described as constant aching, shooting, and

stabbing, and he rated it as 6/10; he attributed the pain to the 1988 accident, and medication that he was prescribed at that time included Lodine, Percocet, and Soma. (*Id.*, p. 564.) In 2010, a Dr. McGriff recommended that he undergo a series of ten manual therapy visits for back, knee, and neck pain related to his 1988 BWC claim. (*Id.*, p. 523.) At another examination in 2010 Gorslene reported having back, knee, and neck pain that related back to the 1988 accident, he described the pain as occurring daily and rated it 8/10; his prescription medication at that time included Lodine, Percocet, and Soma. (*Id.*, pp. 561-562.)

{¶8} Gorslene testified that in June 2010, he settled his 1988 claim with BWC. (*Id.*, p. 494.) Gorslene testified that his back and knee symptoms nevertheless persisted. Gorslene testified that about once a month he would see his long-time family practitioner, Dr. Johnson, who prescribed him pain medication, including Percocet and Soma, in the years leading up to the 2014 accident. Gorslene explained that for a number of years he used prescription narcotic pain medication to help alleviate pain and help him sleep. At the time of the accident, Gorslene stated, he had been experiencing cramping and pain in his back for which he was taking pain medication, mainly at night, but he still loved to work and was doing so full-time. When asked about a record from one of his appointments in 2012 where he was noted to have an antalgic gait, Gorslene acknowledged that he probably had a noticeable limp at the time. Gorslene testified he was prescribed Prozac by Dr. Johnson in 2013 following a diagnosis of depression and anxiety, but said he had a bad reaction and did not take the medication for long. Gorslene also stated that he smoked about one pack of cigarettes a day for some 25 years, until approximately June 2020.

{¶9} Speaking about the 2014 accident, in which the rear end of the ODOT vehicle struck him in the back while he knelt, Gorslene recalled that when emergency medical service responders arrived and placed him on a board, he felt like his ribs were popping. Gorslene told how he was transported by ambulance to Grady Memorial Hospital in

Delaware where he underwent an x-ray and was given a shot of medication that relaxed him and provided some pain relief. As Gorslene recounted, his wife and daughter picked him up from the hospital and took him back to the construction site so that he could secure some tools. Gorslene was in awful pain when he went home after that, having a headache, pain in both knees but more so in the right, and, more than anything, his back hurt, he testified. According to Gorslene, it was approximately two weeks to one month after the accident when he felt well enough to try to return to work, but it proved too difficult and after only a couple of hours he was told to go home. Gorslene stated that he had a physical therapy appointment later that day and the therapist referred him back to his physician. Around that time, Gorslene explained, his back, neck, knees, and ribs hurt and he could barely walk, and although he went to physical therapy it was very painful to do the exercises. He was having migraine headaches, and on occasion he continued to have them even up to the time of trial. He developed a limp, became dependent on a cane due to his back and knee pain, got a knee brace from Dr. Johnson because his kneecap was going to the side, and got a disability parking placard approved by Dr. Johnson. Gorslene testified that he eventually finished physical therapy without his symptoms having been alleviated and he then tried aquatic therapy, which relieved his back pain while he was in the water but the pain returned once he got out of the water.

{¶10} Gorslene testified about various treatments he underwent in the years after the accident to address his pain symptoms including medications, trigger point injections, radio frequency ablation, and a surgically implanted pain pump. Speaking about the pain pump, Gorslene stated that he first underwent a trial period with a stimulator device that did not help his back pain but did help alleviate his knee pain, and thereafter he went forward with the implanted pain pump and eventually he came to feel pretty good. The pain pump stopped working, however, and although he had stopped taking oral narcotic pain medication while the pump was active, he resumed taking the medication after the pump stopped working. Though inactive, the pump remained implanted in his back.

Gorslene also stated that he underwent knee surgery but it did not help and he characterized the condition of his knee as terrible.

{¶11} Gorslene testified that he had been earning full-time hourly wages of \$32.54 before the accident, and after the accident he received BWC benefits in the amount of \$1,698 every two weeks. A few months before the damages trial, Gorslene was approved for Social Security Disability Insurance (SSDI) benefits, which amounted to \$2,004 monthly, he stated, and he was not sure if his BWC benefits would continue after his SSDI approval.

{¶12} Gorslene stated that he loved spending time with his seven grandchildren but that the accident changed how he interacted with them, like limiting his ability to play with or pick them up. Gorslene stated that before the accident he enjoyed bass fishing as well as hunting rabbit, pheasant, and deer, but that he could no longer do those things. He recalled that it was about 2017 when he last tried to go fishing and he was not physically able to do it. The last time he hunted was 2013, to the best of his recollection, but he carried on his tradition of collecting a hunting license every year. On cross-examination he was shown a record from the Ohio Department of Natural Resources indicating that he harvested a buck in Vinton County in 2018, and he explained that he probably purchased a deer permit that year but did not take a deer himself; although he acknowledged it was illegal, he stated that he allowed a friend to use his deer permit and the friend gave him some of the venison.

{¶13} Gorslene described himself as a workaholic and said it hurt him every time he saw a road construction crew because that was what he lived to do but he was no longer capable of doing it. Gorslene characterized his day-to-day life at the time of trial as terrible, largely consisting of sitting around the house and moving from chair to chair trying to get comfortable and occasionally taking his dogs outside. Gorslene stated that he tossed and turned all night, with the complication of having a pain pump implanted in his back, and he regularly needed to get up and take medication.

{¶14} Kedar Deshpande, M.D. testified by way of deposition.¹ (Exhibit 31.) Dr. Deshpande testified that at the time of his deposition he practiced at the Orthopedic and Spine Center in Grove City and had been a licensed physician in Ohio since 1998. Dr. Deshpande stated that he was board-certified in physical medicine and rehabilitation and held another certification from the American College of Pain Medicine. Dr. Deshpande described his practice as focused on patients with chronic pain, trying to develop treatment strategies and therapies to restore function and quality of life for these patients who typically have exhausted all other treatment options without having their symptoms relieved.

{¶15} As Dr. Deshpande explained, he first saw Gorslene on July 10, 2017. At that time, Dr. Deshpande explained, he obtained Gorslene's history and conducted a physical examination that found Gorslene was "asymmetric throughout his thoracic spine" and "had tenderness to palpation throughout", and in all ranges of motion he complained of shock-like, deep, achy, stabbing, burning, and shooting pain, and abnormal skin sensitivity, and the pain was worse when using stairs, walking, sitting, and trying to sleep. Dr. Deshpande stated that Gorslene came to be a patient of his after his previous doctor apparently stopped seeing workers' compensation patients, and at that time Gorslene had been prescribed and was using multiple opioid pain medications and a muscle relaxer—"a ton of medicine"—but reported they were not helping significantly. Dr. Deshpande testified that he prefers not to treat patients with the combination of medications that Gorslene had been taking, so he took him off those and put him a different prescription pain medication (Embeda) and then Gorslene followed up for reevaluation about every 30 days, which was Dr. Deshpande's typical schedule for patients on prescription pain medication.

¹ The objections on pages 31, 32, 33, and 71 are OVERRULED.

{¶16} When Gorslene reported increased pain at his next visit on August 23, 2017, Dr. Deshpande stated that he recommended thoracic epidural steroid injections and facet joint injections with the goal of reducing painful inflammation in and around the spine, and he recommended a spinal cord stimulator, on a trial basis, to negate pain emanating from nerve endings in the spine.

{¶17} Gorslene continued following up each month according to Dr. Deshpande and at his visit on December 20, 2017, he had pain in his cervical and thoracic spine and right knee, and overall his pain level had increased, at least partly because of starting physical therapy. Dr. Deshpande explained that after initially prescribing Embeda he switched Gorslene to a new medication, Nucynta, which was not providing long lasting relief, so he increased the dosage. Dr. Deshpande testified that he also prescribed a prescription muscle relaxer, chlorzoxazone, around this time. On January 25, 2018, Dr. Deshpande performed a thoracic medial branch block with the goal of trying to locate the source of pain in the joints of the spine; this involved putting anesthetic into the joints to determine the source of Gorslene's pain but the only conclusion he could draw from this was that the facet joints were a component of the pain but not the only source. Dr. Deshpande also referred Gorslene for a chiropractic evaluation at some point, he stated, but he could not recall the outcome.

{¶18} On February 15, 2018, Dr. Deshpande implemented the trial spinal cord stimulator, which involved temporarily placing 16 electrodes in the midthoracic region to block pain signals coming from hyperactive nerves, all to see if this would relieve Gorslene's back pain. Before the procedure, Gorslene rated his pain as 9/10; Dr. Deshpande explained that he believes that his records of pain scale numbers throughout Gorslene's treatment were generalized rather than specific to any one body part or location. On February 21, 2018, Dr. Deshpande removed the stimulator device at the conclusion of the trial and at that time Gorslene decided to proceed with having a

spinal cord stimulator implanted because he experienced nearly complete resolution of his knee pain and moderate improvement of his back pain.

{¶19} Dr. Deshpande explained, though, that since back pain was Gorslene's chief complaint and it only moderately improved during the spinal cord stimulator trial, he offered to try an implanted pain pump, which delivers pain medication (morphine, specifically) to the spinal cord receptors such that the patient no longer needs oral pain medication. Dr. Deshpande performed a procedure to implant a pain pump on April 19, 2018, to see if this would provide more relief than the spinal cord stimulator. After having the pain pump for a few months, Gorslene had to have it drained to undergo an MRI ordered by another provider in August 2018, Dr. Deshpande explained, and he became acutely ill after it was re-filled. Dr. Deshpande testified that he switched Gorslene back to oral pain medication (Percocet) while awaiting the results of a study into what caused the complications with the pain pump. At his most recent visit with Gorslene on October 30, 2019, Gorslene reported his overall pain level at 7/10, according to Dr. Deshpande. Dr. Deshpande stated that the pain pump, though inactive, remained implanted and Gorslene's pain was being managed with 10 mg of Percocet three times a day.

{¶20} Dr. Deshpande opined that the conditions for which he treated Gorslene resulted from the 2014 accident, reasoning that Gorslene was asymptomatic before the accident and that his issues started afterward. But Dr. Deshpande later admitted he was not sure he asked Gorslene about certain aspects of his history pre-dating the accident, and, some of the information he got from Gorslene was inaccurate, he knew little to nothing of Gorslene's medical history pre-dating the accident, and he was not aware that at the time of the accident Gorslene was already taking prescription pain medication (Percocet), prescription medication used off-label to treat nerve pain (Neurontin), and a prescription muscle relaxer (Soma), which he stated were medications that would only be given to someone in severe pain; indeed, he admitted Gorslene was on more medication before the accident than at the time of his last visit. Dr. Deshpande also acknowledged

Gorslene had arthritis in his spine and that in his report he said it is unlikely the injury to his back accelerated this degenerative condition. Finally, Dr. Deshpande went on to opine that the symptoms Gorslene reported to him were permanent and that Gorslene's injuries would prevent him from returning to work as a heavy equipment operator, although he later admitted that he did not know anything about Gorslene's occupation other than the title of heavy equipment operator.

{¶21} B. Rodney Comisar, M.D. testified by way of deposition.² (Exhibit 32.) Dr. Comisar stated that he is a board-certified orthopedic surgeon, licensed to practice medicine in Ohio since about 2000. Dr. Comisar recounted first seeing Gorslene on November 13, 2014, for complaints of right knee problems. As Dr. Comisar explained, Gorslene had been referred to him for evaluation following an MRI of the knee. From the history he took of Gorslene, Dr. Comisar noted complaints of swelling, stiffness, and a limp, as well as difficulty climbing, squatting, stooping, and kneeling, and pain at night that was interfering with sleep; the reported symptoms also included some popping, catching, and locking of the knee. While he noted at the time that Gorslene reported having three bulging disks in his spine as a result of the accident, Dr. Comisar explained that he did not treat Gorslene for any issues with his back, only his knee. Dr. Comisar felt that Gorslene had some kind of back problem but stated that he could not comment on the extent of it nor relate it to the 2014 accident.

{¶22} Concerning the right knee, Gorslene had undergone two arthroscopic surgeries previously, the last one being about five years earlier, according to the history taken by Dr. Comisar. Dr. Comisar explained how, during the examination, Gorslene had some pain with squatting, extremes of motion, and compression maneuvers, and that the tenderness was mainly in the inner side of the knee and extending back. Dr. Comisar stated that Gorslene nevertheless had normal range of motion for someone his age with

² The objections on pages 13, 15, 18, 20, 31, 40, and 41 are OVERRULED.

a history of osteoarthritis. Dr. Comisar testified that he diagnosed Gorslene with a contusion (which he explained to be a nonspecific term for something like a “blow to the knee”) as well as a substantial aggravation of patellofemoral chondromalacia, which refers to softening of cartilage; he also noted the presence of a small cyst. Dr. Comisar explained that he understood an MRI from 2010 had shown some underlying osteoarthritis and that there were some mild changes noted in the 2014 MRI report. Dr. Comisar reasoned that the substantial aggravation of Gorslene’s preexisting knee issues due to the accident was evident because Gorslene “was asymptomatic in that he was * * * doing construction work and he has the accident and now he’s symptomatic and painful from it.” At his initial visit with Gorslene, Dr. Comisar recommended physical therapy, a steroid injection, anti-inflammatories and icing, and a knee brace was offered to help with ambulating, he stated.

{¶23} Dr. Comisar testified that he saw Gorslene again January 6, 2015, for an injection, and at that time Gorslene had gone to one therapy session for his knee and reported that the brace helped with his stability, and his diagnoses were substantially the same. There was apparently a lack of improvement following the injection and therapy, and Dr. Comisar consequently performed arthroscopic surgery in March 2015, he stated. At a follow-up visit eight days after the surgery, according to Dr. Comisar, Gorslene reported minimal pain and that he was doing 90 percent better. Dr. Comisar testified that at a follow-up visit on April 9, 2015, Gorslene said his knee symptoms had essentially resolved but his low back still bothered him. Dr. Comisar stated, though, that even after resolution patients can sometimes get flares of symptoms.

{¶24} According to Dr. Comisar, it was well over a year later, in August 2016, when he saw Gorslene again, and at that time Gorslene reported the knee still felt better but was weak and he consequently was wearing a knee brace, and Gorslene also reported that he felt his back pain was affecting his ability to rehabilitate the knee. An MRI taken the month before had shown “some progression” of osteoarthritis in the knee compared

to the MRI taken in 2014, Dr. Comisar related. From Dr. Comisar's records, he gave another steroid injection at that time, recommended therapy and exercise, and gave Gorslene a different kind of knee brace because his symptoms had become localized in the front of the knee. Dr. Comisar stated that by the time of a follow-up visit in September 2016, he increasingly felt Gorslene's back problems were limiting his ability to recover strength in the knee, although again Dr. Comisar made clear that he did not treat Gorslene's back issues and could not relate them to the 2014 accident.

{¶25} On February 15, 2017, Gorslene was seen for a lubricant injection; he walked without a limp but reported using a cane at times for ambulating, and his diagnoses remained the same, Dr. Comisar stated. Gorslene came back for another lubricant injection on May 8, 2018, having reported that the previous one provided some relief, and his diagnoses remained the same. When Gorslene returned for another lubricant injection on May 21, 2019, his diagnoses remained the same, although there was increased knee pain and more limping, Dr. Comisar stated. According to Dr. Comisar, he felt Gorslene's limping was caused at least in part by his back problems. As Dr. Comisar recounted, Gorslene's last visit was a follow-up on June 25, 2019, at which time he reported some relief from the last injection and Dr. Comisar noted that x-rays taken at that time showed some more progression of his arthritis. As he had done previously, Dr. Comisar testified, he encouraged Gorslene to seek treatment for his back issues so that they would not hinder his right knee from improving.

{¶26} Overall, in Dr. Comisar's opinion Gorslene had patellofemoral chondromalacia and arthritis or osteoarthritis before the 2014 accident, and he based that opinion on Gorslene's age, occupation, and evidence that he had those preexisting conditions, but in Dr. Comisar's opinion the accident "seemed to kind of accelerate that or aggravate or exacerbate it." Dr. Comisar opined that Gorslene would need future medical care and treatment for his right knee as a result of the aggravation of his preexisting knee conditions, and, when asked if it the right knee was capable of improving

he stated that he thought it could potentially improve with a knee replacement at some point, but he also stated that a patient with Gorslene's preexisting conditions may have eventually needed a knee replacement regardless.

{¶27} On cross-examination Dr. Comisar admitted that his opinion on Gorslene's preexisting conditions being aggravated by the accident was substantially based on what Gorslene told him, and he admitted both that he did not know what kind of construction work Gorslene performed and that some kinds of that work, like driving equipment, are less rigorous than others. Dr. Comisar acknowledged that osteoarthritis is a progressive disease which worsens over time and he had no way to measure any aggravation of the disease that may have been caused by the accident other than Gorslene's own subjective statements. According to Dr. Comisar, he did not review the records of Gorslene's care and treatment by Dr. Johnson before the accident nor from the emergency room visit immediately after the accident. While Dr. Comisar understood that Gorslene had been taking Percocet, Soma, and ibuprofen at the time of the accident, he did not know the doses or frequency of the medications nor that Gorslene was also taking Neurontin. After being shown the medications Gorslene reported taking during his emergency room visit, Dr. Comisar testified that "those are pretty high doses of pain meds on a chronic basis" and that Gorslene probably should not have been working while on those medications. He also testified that it would have been helpful to some extent for him to have had this information before rendering his opinions. After seeing in the emergency room records where Gorslene reported that his chronic knee pain was unchanged, Dr. Comisar stated that his opinions may have changed "perhaps to some extent" if he had known this.

{¶28} Dr. Comisar also acknowledged that he did not know Gorslene had torn the meniscus in his right knee prior to the accident, nor did he know what was done during the two prior arthroscopic surgeries on the right knee and he thus could not compare those surgeries to the one that he performed. According to Dr. Comisar, the cyst that was identified in the post-accident MRI in 2014 could have resulted from the prior torn

meniscus; he explained that this kind of cyst can cause pain and swelling in the knee, and that reducing the cyst was one of the things that he did when he operated.

{¶29} Sara Ford, a vocational economic analyst from Louisville, Kentucky, provided expert testimony for Gorslene. Ford identified documents that she reviewed for the case and said she interviewed Gorslene in April 2017, at which time she also reviewed some of his medical records with him.

{¶30} Ford testified that in her work, she reviews a person's disability and evaluates how it will impact his or her earning capacity. Earning capacity refers to how much a person can earn from working, she explained, and is based on one's education, training, and work experience, as well as one's physical ability to work. As Ford described, her analysis looks at a person's characteristics, such as the kind and amount of work one performed in the past, combined with medical information about what work the person can perform at present. According to Ford, while a majority of disabled people retain some ability to work, a permanent injury will reduce or eliminate one's ability to perform certain jobs, and her work examines each person's specific circumstances. On the whole, persons with disabilities work less and earn less than persons without disabilities, Ford explained, and she measures the amount of that reduction in earnings for the individual, relying in part on federal government data regarding the disabled population. Ford shared how work-life expectancy factors into her analysis as well, to determine how long one would typically be expected to work, taking into consideration variables including gender, age, education, and disability status.

{¶31} As Ford explained, she understood from Gorslene that before the 2014 accident he did not have any physical limitations that prevented him from working full-time as a heavy equipment operator in the construction industry. Ford also understood from Gorslene that, following the accident, he was limited in certain daily activities such as sitting, standing, or walking for long periods, he was in constant pain, and he had limited range of motion. Ford testified that in understanding Gorslene's limitations and

abilities, she relied on him to relate how his disability affected his daily life, but in terms of the permanency and causation of any disability, she looked to information from his medical providers, as these issues were beyond the scope of her review.

{¶32} Ford testified that for purposes of her work in calculating Gorslene's lost earnings, based upon her review of information from Gorslene's medical providers, she understood or assumed that the 2014 accident caused him permanent injury and that he could not return to any kind of work. Ford in particular understood from reading Dr. Deshpande's deposition that Gorslene was 100% occupationally disabled. Ford did not know about Gorslene's 1988 accident, nor that he received BWC benefits out of that accident for 22 years; in terms of any preexisting medical issues, she only knew that he had undergone arthroscopic knee surgery. Concerning any consideration she gave to the opinions of defendants' expert in this matter, Dr. Hannallah, she testified that she learned of his opinions several weeks before trial and understood that they differed from those of Drs. Comisar and Deshpande, but it did not change her analysis. Ford explained that her role in the case is not to address causation, but instead to look at Gorslene's physical limitations and how they relate to his ability to work, and whether due to the 2014 accident or something else she understood he was unable to work. For purposes of calculating Gorslene's lost earnings, she operated on an assumption that his injuries from the 2014 accident were the reason for his being disabled.

{¶33} Ford testified that she obtained Gorslene's wage history from him directly, while acknowledging on cross-examination that the most accurate source would have been his employer. Ford explained that she then adjusted Gorslene's lost wages to account for the value of lost fringe benefits. While Ford did not know the actual fringe benefits Gorslene received in the past, she calculated his adjusted earnings based on the average benefits received by civilian workers, acknowledging again on cross-examination that having the actual benefit information from Gorslene's employer would have been the most accurate method of calculation. As for the hours worked by Gorslene before the

accident, Ford had documentary support for some earlier years and stated that Social Security statements for the later years indicated that he continued to work similar hours annually.

{¶34} Ford stated that her first report for the case, dated May 23, 2017, was followed by three supplemental reports as well as a one-page summary chart that she produced in February 2021. As Ford received additional information, some of her opinions changed and she supplemented her report accordingly. For example, Ford reduced her calculation of future lost earnings when she received information from the Social Security Administration from which she understood Gorslene would receive SSDI benefits indefinitely, she stated. She also stated that she understood he would continue receiving BWC benefits indefinitely.

{¶35} According to Ford's calculations, Gorslene lost a total of \$447,705 in adjusted earnings from the time of the September 29, 2014 accident through February 2021. Since the accident, beginning in 2014, Gorslene received BWC benefits totaling \$277,133, and beginning in 2019 he received SSDI benefits totaling \$37,008, by Ford's calculations. Subtracting the BWC and SSDI benefits from the lost adjusted earnings equals \$133,564 of loss, according to Ford's analysis. As to future lost earnings, Ford testified that this was much more difficult to gauge than Gorslene's past lost earnings due to several variables, such as the probability of future employment, and although she thought he would have some future lost earnings it was difficult to quantify.

{¶36} David Hannallah, M.D. testified by way of deposition.³ (Exhibit H.) Dr. Hannallah, a board-certified orthopedic surgeon, explained that his practice primarily involves patients with spine issues and performing spinal surgery, but he also sees patients with general orthopedic complaints. Dr. Hannallah identified the records that he reviewed for this case, totaling some 1,500 pages by his count, and he described a

³ The objections on pages 15, 37 (line 3), 60, 70, 75, and 78 are OVERRULED. The objections on page 37 (line 20) and 77 are SUSTAINED.

physical examination of Gorslene that he conducted on September 30, 2019; he stated that his examinations take about 15 minutes and that he conducts about 100 of them annually for defense attorneys.

{¶37} As Dr. Hannallah described, he first had Gorslene give him a health history, which he summarized in his testimony. Dr. Hannallah testified that he then performed a physical examination which showed Gorslene's physical condition to be fairly normal in several ways, such as having no muscle atrophy or asymmetry. While Gorslene purported to have pain and weakness throughout his body, when Dr. Hannallah tested his strength his muscles looked normal, there was no objective, physiological explanation why he said every movement hurt and why he was weak, and telling him everything was weak differed from what Gorslene told other doctors, according to Dr. Hannallah. In Dr. Hannallah's view, the examination was consistent with, and indeed pointed to, a patient trying to exaggerate his symptoms. In contrast to the global weakness Gorslene claimed to have during Dr. Hannallah's examination on September 30, 2019, his strength was recorded as 5 out of 5 during a visit with an occupational health physician on October 23, 2014, less than a month after the accident.

{¶38} Dr. Hannallah noted that when Gorslene visited the emergency room after the accident, he had full range of motion in his neck with no pain, he was able to move his extremities without pain, he had no weakness nor difficulty walking, and x-rays showed no fractures. Dr. Hannallah also noted that in the emergency room, Gorslene reported having pre-existing chronic knee pain which was unchanged, and the only new pain he was noted to have was in the right side of his back. While Dr. Hannallah acknowledged that Gorslene had a lumbar strain as diagnosed in the emergency room, he explained that this was not a long-term or permanent injury; rather, it was a muscular strain, i.e. a stretching injury, which typically resolves on its own in a few days or a few weeks. Dr. Hannallah allowed that it was possible Gorslene had some other mild strain injury or injuries that did not manifest immediately after the accident and thus were not

noted in the emergency room records, but that these still would have been short-term injuries.

{¶39} Dr. Hannallah did not dispute that Gorslene experienced pain, including in his back and right knee, in the months and years after the accident, but in Dr. Hannallah's opinion Gorslene exaggerated his symptoms and his chronic pain complaints were not attributable to the accident. Dr. Hannallah noted that there is evidence Gorslene had chronic pain most of his adult life, he was already taking high-dose narcotics at the time of the accident, and he specifically had back and right knee problems before the accident. Gorslene was known to have ongoing degenerative change associated with arthritis in his right knee and back from imaging performed before the accident and subsequent imaging did not show acute abnormalities or anything beyond the normal progression that typically occurs with age, explained Dr. Hannallah. Dr. Hannallah pointed out that the 2014 MRI report noted arthritis only "slightly worse from his prior imaging studies." After testifying that there was no objective evidence that Gorslene's right knee pain could be related to the accident, Dr. Hannallah admitted that he relies on subjective information from patients in his own practice, but, as Dr. Hannallah also pointed out, it was specifically noted in the emergency room that Gorslene said his longstanding right knee pain associated with arthritis was unchanged after the accident.

{¶40} In brief, Dr. Hannallah's opinion was that Gorslene's chronic pain complaints and arthritis were not attributable to the accident, and that the muscular strain and any other injury from the accident should have resolved within a few weeks. Dr. Hannallah opined that Gorslene would not need future treatment for any injuries from this accident and that while his arthritis will probably worsen with age as it does for everyone, and he may need a knee replacement in the future, these long-term knee issues are not related to the accident. Dr. Hannallah stated that his review in this matter was not to address whether Gorslene was a disabled person, but that in his opinion Gorslene was "not disabled with regard to this accident."

{¶41} “To set forth a claim for negligence a plaintiff must prove four elements: (1) the existence of a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Stefansky v. Cantina Laredo*, 2016-Ohio-7008, 72 N.E.3d 97, ¶ 23 (10th Dist.). “It is axiomatic that every plaintiff bears the burden of proving the nature and extent of his damages in order to be entitled to compensation.” *Jayashree Restaurants, LLC v. DDR PTC Outparcel LLC*, 10th Dist. Franklin No. 16AP-186, 2016-Ohio-5498, ¶ 13, quoting *Akro-Plastics v. Drake Indus.*, 115 Ohio App.3d 221, 226, 685 N.E.2d 246 (11th Dist.1996). “As a general rule, the appropriate measure of damages in a tort action is the amount which will compensate and make the plaintiff whole.” *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-589, 2013-Ohio-1677, ¶ 17. “[D]amages must be shown with reasonable certainty and may not be based upon mere speculation or conjecture * * *.” *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007-Ohio-3739, 875 N.E.2d 993, ¶ 20 (10th Dist.).

{¶42} Upon review of the evidence presented at trial, the magistrate makes the following findings. As a result of being struck by the ODOT vehicle on September 29, 2014, Gorslene sustained a low back strain that caused him immediate pain, particularly in the right side of his back. At his emergency room visit shortly after the accident he had no other complaints other than his chronic right knee pain, which was the same as usual for him, and he had no difficulty walking.

{¶43} Although it did cause him substantial pain, Gorslene’s low back strain more likely than not resolved within no more than a few weeks. While Gorslene sought to establish that he sustained some long-term or permanent back injury from the accident, this would involve the sort of injury that is “internal and elusive” rather than the type of observable, external injuries that are within the scope of common knowledge, and, as a result, expert testimony is required to establish a causal connection. *Argie v. Three Little Pigs, Ltd.*, 10th Dist. Franklin No. 11AP-437, 2012-Ohio-667, ¶ 15; *Wright v. Columbus*, 10th Dist. Franklin No. 05AP-432, 2006-Ohio-759, ¶ 19. Expert testimony is even more

important here where Gorslene already had osteoarthritis and substantial, persistent back pain over a period of many years before the accident. And there was no credible evidence that Gorslene was diagnosed with any back injury out of the accident beyond a low back strain that should have resolved on its own.

{¶44} While Dr. Deshpande attributed his much later treatment of Gorslene's back pain to the accident, his conclusory opinion was based on the erroneous belief that Gorslene was asymptomatic before the accident. On top of his minimal knowledge of Gorslene's preexisting conditions and preexisting pain management regimen, Dr. Deshpande first saw Gorslene more than two years after the accident and his role was to manage Gorslene's pain rather than diagnose or treat an underlying spinal or back injury. In contrast, Dr. Hannallah is an orthopedist who regularly treats spinal issues, he had superior information about Gorslene's medical history, and his testimony on Gorslene's back problems carried more weight. While Dr. Deshpande's pain management care of Gorslene is not necessarily in dispute or criticized, his opinions on causation are unavailing. And whereas Dr. Comisar saw Gorslene for his right knee complaints, Dr. Comisar did not provide care and treatment for Gorslene's back and did not offer testimony causally relating any back injury to the accident. There is simply no meaningful expert testimony tending to prove that Gorslene sustained a long-term back injury as a result of the accident.

{¶45} Regarding the right knee, even though Gorslene had no difficulty walking and did not perceive any change from his usual chronic pain when visiting the emergency room, it appears more likely than not that he did sustain some injury to the knee at least in part consistent with Dr. Comisar's testimony. As Dr. Hannallah acknowledged, it was possible that Gorslene had sustained some injury in addition to the low back strain which did not yet manifest while at the emergency room. The injury to Gorslene's knee was not shown by a preponderance of the evidence, however, to be long-term or permanent. To the extent Dr. Comisar opined otherwise, it is apparent that he did not have a clear picture

of the extent of Gorslene's preexisting right knee issues, including the significant quantities and frequency of pain medication he was taking before the accident as well as Gorslene's prior torn meniscus; indeed, Dr. Comisar acknowledged that his opinions might have changed if he had known more about Gorslene's preexisting conditions. The review of medical records conducted by Dr. Hannallah, on the other hand, encompassed much more information than what Dr. Comisar had and his opinion that the ongoing deteriorative changes in the right knee naturally resulted from preexisting conditions carried more weight.

{¶46} From Dr. Comisar's testimony and records it appears that any harm to the right knee resulting from the accident was substantially resolved within six months, after Gorslene had undergone several treatments and ultimately an arthroscopic procedure performed by Dr. Comisar. Gorslene reported that his right knee problems were essentially resolved at that point and it was more than a year before he returned to Dr. Comisar with knee complaints. Gorslene's back problems had persisted and as Dr. Comisar explained it became apparent that the back problems were causing problems with the right knee and were thus more significant in terms of his loss of physical ability; plus, the knee issue then was different, with the front of the knee being the focal point whereas it had been the inner part and back of the knee. On top of this, Gorslene clearly had progressive deteriorative change in the knee that was documented before the accident and continued to be seen in the years after the accident, he had previously undergone two arthroscopic knee surgeries, and he was a potential candidate for knee replacement surgery whether or not the accident had occurred according to Dr. Comisar. Long after the accident Gorslene was noted to have begun limping, but he had been noted to have a limp some two years before the accident according to the medical records and Dr. Comisar explained that the limp resulted at least in part from Gorslene's long-term back problems which were not shown to have been caused by the accident.

{¶47} Moreover, the short-term injuries to the back or knee were not shown to have caused the global bodily weakness Gorslene reported having years later when he saw Dr. Hannallah, whose testimony casts further doubt on plaintiff's theory of the case in that he persuasively explained seeing no objective measure to support that global weakness when he examined Gorslene. To the extent Gorslene did experience some long-term physical decline though, again there is no question that he suffered from progressive deteriorative osteoarthritic change that pre-dated the accident. In the final analysis, plaintiff failed to show that he became permanently disabled or otherwise suffered permanent injury from this accident. Additionally, to the extent that Gorslene described having migraine headaches intermittently from the time of the accident onward, again there was no expert testimony to explain this and causally relate it to the accident.

{¶48} It is true that Gorslene had worked full-time before the accident and did not continue doing so after the accident, eventually being recognized as disabled by BWC and SSDI. It is also true, however, that Gorslene had significant back and knee problems for more than two decades before the accident, so much so that he was seeing a doctor monthly and regularly using a combination of prescription narcotics that Dr. Deshpande said would only be used for a patient in severe pain; Dr. Comisar concurred they were high doses for someone to use on a chronic basis. In fact, as Dr. Deshpande stated there came a point in his care of Gorslene that Gorslene was taking less pain medication than he did before the accident. Also, before the accident, Gorslene had a claim with BWC from a prior work injury that was active for 22 years. And he reported the level of pain in his back and knee was 8/10 four years before the accident. Simply put, the evidence shows that before the accident Gorslene already suffered from physical impairments. Since the evidence presented at trial failed to demonstrate that he sustained permanent injury to his back or right knee, it is difficult to see how these short-term injuries were the cause of him never returning to work.

{¶49} Accordingly, while Gorslene's testimony portrayed a real decline in his quality and enjoyment of life in the years after the accident, the pain and suffering that he established to have been caused by the accident was only temporary in nature. While Gorslene had already suffered chronic back and knee pain for many years and was taking several prescription drugs for the same, nevertheless it is apparent that the back and knee injuries he sustained in the accident caused him additional pain temporarily. Apart from Drs. Comisar and Deshpande, the evidence of Gorslene's pain and suffering was more or less limited to his own testimony. While the magistrate is persuaded that Gorslene experienced substantial pain above and beyond his pre-existing chronic pain for some time after the accident, the accident was not shown to be the cause of him never returning to work. The magistrate finds that the damages proven for Gorslene's past pain and suffering amount to \$30,000.

{¶50} Gorslene did not seek any damages for out-of-pocket medical expenses. In terms of wage loss, while the greater weight of the evidence does not support Gorslene's claim to be permanently unable to work as a result of the accident, he did establish that his injuries rendered him unable to work for some time. Consistent with the finding that any injuries were substantially resolved within six months, he is entitled to damages for lost wages for that period of time. Based on the testimony of Sara Ford, the value of Gorslene's lost earnings, including an approximation of lost benefits, in 2014 was \$16,874, representing essentially the last three months of that year; the value of his lost earnings, including an approximation of lost benefits, in 2015, was \$65,844, and taking one quarter of that figure as to represent the first three months of that year produces a figure of \$16,461. From this six-month total of lost earnings (\$33,335), the BWC benefits that he received in 2014 (\$7,520) and one quarter of the BWC benefits that he received in 2015 (\$44,148 reduced by three quarters to \$11,037) shall be deducted as collateral sources pursuant to R.C. 2743.02(D). This amounts to a total wage loss of \$14,778.

{¶51} Finally, plaintiff Connie Gorslene did not pursue her loss of consortium claim and is thus not entitled to relief for the same.

{¶52} Based upon the foregoing, the magistrate finds that plaintiff is entitled to damages in the amount of \$30,000 for past pain and suffering, and \$14,778 for lost wages. It is also recommended that plaintiff be awarded the \$25 filing fee cost. Accordingly, it is recommended that judgment be entered for plaintiff in the total amount of \$44,803.

{¶53} A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. The objections shall be considered a motion. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

ROBERT VAN SCHOYCK
Magistrate