

Munson v. State, No. S0568-08 CnC (Toor, J., Sept. 21, 2009)

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STATE OF VERMONT
CHITTENDEN COUNTY

TERRY MUNSON
Plaintiff

v.

STATE OF VERMONT
Defendant

SUPERIOR COURT
Docket No. S0568-08 CnC

RULING ON MOTION FOR SUMMARY JUDGMENT

Plaintiff Terry Munson sues the State of Vermont alleging that he was injured during a polygraph examination because the examiner negligently applied a blood pressure cuff to Plaintiff's arm. The State has moved for summary judgment, arguing that: (1) Munson signed a consent form which exculpates the State from liability; (2) the State did not breach its duty to Munson; and (3) Munson has failed to establish the element of causation. Hobart F. Popick, Esq. represents Plaintiff; David Cassetty, Esq. represents the State of Vermont.

“[S]ummary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.” Stamp Tech, Inc. ex rel. Blair v. Lydall/Thermal Acoustical, Inc., 2009 VT 91, ¶ 11; see also V.R.C.P. 56(c)(3). On summary judgment, the court considers the facts presented in the light most favorable to the nonmoving party. Madkour v. Zoltak, 2007 VT 14, ¶ 12, 181 Vt. 347, 351. The court further affords the nonmoving party the

benefit of all reasonable doubts and inferences. Stamp Tech, Inc., 2009 VT 91 at ¶ 11. However, “[i]f the nonmoving party fails to establish an essential element of its case on which it has the burden of proof at trial, the moving party is entitled to summary judgment as a matter of law.” Washington v. Pierce, 2005 VT 125, ¶ 17, 179 Vt. 318, 325 (2005) (quoting State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995)).

The following material facts are derived from the statements filed by the parties pursuant to V.R.C.P. 56(c)(2). Disputes are noted where appropriate. On April 27, 2005, Plaintiff Terry Munson voluntarily appeared at the Vermont State Police Barracks in Middlesex. At the barracks, Detective Sergeant Twohig, a Vermont State Trooper, performed a polygraph examination on Munson. Prior to examining Munson, Twohig had been trained to perform polygraph examinations. A likeness of Munson’s signature appears on a document entitled “Polygraph Consent.”

The polygraph examination consisted of an instruction period and at least four examination periods in which various apparatus were applied to Munson’s person. There is a dispute about precisely what Munson said during the examination, and in particular whether he said he felt any pain. Throughout the four examinations, Munson’s blood pressure was monitored through the use of a blood pressure cuff on his right arm. After each examination session, the blood pressure cuff was released. On April 27, 2005, after the examination, Munson went to Fletcher Allen Health Care in Burlington, Vermont for treatment of his alleged injuries.

At a May 5, 2005 visit with his primary care physician, Dr. Sirois, Munson complained of right arm pain and numbness. On June 13, 2005 and again on July 1, 2005, Munson complained of right arm pain to Dr. Sirois. At a July 27, 2005 visit with

Dr. Sirois, Munson requested referral for a “pinched nerve” in his right arm. On September 13, 2005, Muson saw Dr. Trabulsy of Fletcher Allen Health Care Orthopedics, who recommended nerve conduction studies. Munson saw Dr. Zweber on September 14, 2005, who performed a nerve conduction study and concluded that Munson had “a mild to moderate ulnar nerve injury.”

Dr. Zweber performed further nerve conduction studies on December 21, 2005, and concluded that “[t]here remains an approximate 25% axonal injury of the right ulnar nerve at the level of the proximal to mid arm.” Munson saw Dr. Zweber for a third time on April 4, 2006, when Dr. Zweber performed further nerve conduction studies and concluded that “Unfortunately, the EMG shows if anything a [sic] somewhat more evidence of axonal injury. I would place him in the 10-20% of the total ulnar axon population” Following the April 2006 visit with Dr. Zweber, Dr. Trabulsy recommended “continued strengthening and conditioning of the right hand, forearm and upper arm as much as tolerated.”

The court does not reach the issues relating to the consent form or the presence of breach because it concludes that Munson has failed to establish the element of causation essential to any negligence claim. “[W]hen a physical process is obscure, abstruse or so far outside common experience that lay jurors can only speculate about it expert testimony is required to explain the process.” So. Burlington Sch. Dist. v. Calcagni-Frazier-Zajchowski Architects, Inc., 138 Vt. 33, 46 (1980). Thus, expert testimony was required where the issue was whether a cerebral hemorrhage could be caused by exertion from doing certain work. Laird v. State of Vt. Highway Dep’t, 110 Vt. 195, 199 (1939). Likewise, whether a sliver in the thumb could cause a man to die of cerebral thrombosis

is a question that requires expert medical testimony. Burton v. Holden & Martin Lumber Co., 112 Vt. 17, 19 (1941).

Here, Munson alleges that a negligently applied blood pressure cuff caused his ulnar nerve injury. Munson has not presented the opinion of any expert to that effect. The physical process by which a blood pressure cuff might cause an ulnar nerve injury is outside of common experience. The facts of this case are not such that “any layman would know, from his own knowledge and experiences, that the breach of duty was the proximate cause of the injury.” So. Burlington Sch. Dist., 138 Vt. at 46. Without any expert testimony to the effect that the application of the blood pressure cuff caused his injury, Munson has failed to establish the essential element of causation, and the State is therefore entitled to summary judgment as a matter of law.

Order

Because Munson has failed to establish an essential element of his case, the State’s motion for summary judgment is granted.

Dated at Burlington this ____ day of September 2009.

Helen M. Toor
Superior Court Judge