

PAUL E. HUBBARD,

Plaintiff

vs.

HILDA J. YOUNG,

Defendant

: IN THE COURT OF COMMON PLEAS OF
: LYCOMING COUNTY, PENNSYLVANIA

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: NO. 02-01,753

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: MOTION FOR SUMMARY JUDGMENT

Date: August 5, 2004

OPINION and ORDER

Before the Court for determination is the Motion for Partial Summary Judgment of Defendant Hilda J. Young filed April 20, 2004. The Motion will be denied.

The present case arises out of a motor vehicle accident. On September 29, 2000, Plaintiff Paul Hubbard (hereafter Hubbard) and his wife, Joan Hubbard, were traveling east on West Fourth Street in the city of Williamsport, Pennsylvania. On the same date and time, Hilda Young (hereafter Young) was traveling north on Rose Street in the city of Williamsport. West Fourth Street and Rose Street intersect. It was at this intersection that the Hubbard and Young vehicles collided. At the time of the accident, Hubbard was the named insured of an insurance policy issued by Atlantic States Insurance Company. Hubbard had elected the limited tort option under the policy.

Hubbard did not seek medical attention until the following day when he went to the Williamsport Hospital emergency room. According to the emergency room records, Hubbard was complaining of pain in his lower back, which had gotten worse since the day before. The records also reflect that there was tenderness in the lower back. According to the

radiology report of the x-rays taken, there was no fracture of the spine, but degenerative changes in the lumbar spine were evident.

Young argues that Hubbard has failed to provide sufficient evidence to establish that he suffered a serious injury in the motor vehicle accident and cannot recover for non-economic damages as a result. Young contends that Hubbard must produce expert medical testimony to establish that there has been a serious impairment of a bodily function and may not rely on subjective allegations. Young asserts that Hubbard has failed to produce expert testimony that demonstrates how he has suffered a serious injury as a result of the motor vehicle accident, and that there is nothing in Hubbard's medical records that demonstrate this or permit such an inference to be drawn.

Further, Young argues that reasonable minds could not differ that Hubbard has not suffered a serious injury. Young contends that any back pain resulting from the motor vehicle accident appears to have resolved within a month of undergoing physical therapy. The subsequent physical therapy was for exacerbation of preexisting back pain complications from diabetes, and follow up examination for his pentuple heart bypass surgery. Young asserts that treatment records offer no indication that the therapy was related to an injury suffered in the motor vehicle accident. Young contends that Hubbard has not suffered an injury that seriously impairs a body function. Young argues that Hubbard's mobility had been limited prior to the accident and had not diminished thereafter. Young asserts that Hubbard's ability to ride in an automobile was not affected by the accident; in fact, Hubbard was able to make his annual trip with his wife to their winter residence in Florida. As to Hubbard's alleged inability to sleep

more than two hours at a time in a bed, Young contends that this is more likely the result of sleep apnea, which Hubbard was diagnosed with more than one year prior to the accident.

In response, Hubbard asserts that he has produced sufficient evidence to establish that he has suffered a serious injury resulting from the motor vehicle accident. Hubbard contends that while he did have various health problems prior to the accident, the problems he has had and continues to suffer are a result of the severe back pain that he only began to suffer after the accident. Hubbard argues that the record in the case provides ample evidence for a jury to conclude that he has suffered a serious injury as a result of the accident. Hubbard asserts that the medical records clearly make reference to his back pain and the motor vehicle accident. The medical records indicate that the lower back pain he was experiencing was due to lumbosacral myofascial strain following the accident. The medical records further indicate that Hubbard underwent physical therapy for the back pain, which he continued to do into the spring of 2003.

Hubbard argues that he has suffered a serious impairment of a body function. Hubbard asserts that his mobility has been impacted by his injury. Hubbard contends that he started to use a cane after the accident to assist him in walking and that the back pain is so severe at times as to prevent him from walking. Hubbard states that his inability to walk was previously caused by his breathing problems, which have now abated. Regarding his ability to ride in a car, Hubbard asserts that now his son drives him and his wife to Florida, previously he and his wife took turns during the trip. Hubbard also asserts that he must stop every hour or so to get out and move around because of the pain. Hubbard acknowledges that prior to the accident he would stop every several hours, but it was not because of back problems as is

presently the case. As to his sleeping difficulties, Hubbard asserts that his sleep apnea is not the cause of his inability to sleep or lay in bed for more then two hours. He contends that it is directly related to his back pain, because prior to the accident he had no problem lying in a bed. Hubbard stresses that prior to the accident he had no noticeable back problems, while after the accident he has had serious and continuous back problems.

The Motor Vehicle Financial Responsibility Law (MVFRL) allows motorist a choice of insurance coverage – full tort or limited tort. 75 Pa.C.S.A. §1705. The limited tort option does not provide the same amount of coverage as the full tort, but this reduced coverage is offset by lower insurance rates. *Robinson v. Uphole*, 750 A.2d 339, 341 (Pa. Super. 2000).

The limited tort alternative provides that an insured:

...who elects the limited tort alternative remains eligible to seek compensation for economic loss sustained in a motor vehicle accident as the consequence of the fault of another person pursuant to applicable tort law. Unless the injury sustained is a serious injury, each person who is bound by the limited tort election shall be precluded from maintaining an action for any noneconomic loss... .¹

75 Pa.C.S.A. §1705(d). Thus, if an individual selects the limited tort option he “...surrenders the right to sue for non-economic damages, such as pain and suffering, which were sustained in a motor vehicle accident unless ... [he] suffers a serious injury.” *Hellings v. Bowman*, 744 A.2d 274, 275 (Pa. Super. 1999). But, the limited tort elector may still seek recovery for all medical and out-of-pocket expenses. *Robinson*, 750 A.2d at 341.

¹ The MVFRL provides exceptions to the no recovery for noneconomic damages absent serious injury rule under the limited tort alternative. 75 Pa. C.S.A. §1705(d)(1)-(3). None of those exceptions are at issue in the case as none have been pleaded or argued.

Under the MVFRL, a serious injury is “[a] personal injury resulting in death, serious impairment of body function or permanent serious disfigurement.” 75 Pa. C.S.A. §1702; *Furman v. Shapiro*, 721 A.2d 1125, 1126 (Pa. Super. 1999). Determining whether there is a serious impairment of body function is a two part inquiry:

- 1) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?
- 2) Was the impairment of the body function serious? The focus of these inquiries is not on the injuries themselves, but on how the injuries affected a particular body function. Generally medical testimony will be needed to establish the existence, extent, and permanency of the impairment.... In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious.

Washington v. Baxter, 719 A.2d 733, 740 (Pa. 1998); *McGee v. Muldowney*, 750 A.2d 912, 914 (Pa. Super. 2000); *Kelly v. Ziolk*, 734 A.2d 893, 898 (Pa. Super. 1999). The traditional summary judgment standard is to be applied in limited tort cases. *Kelly*, 734 A.2d at 898; *Furman*, 721 A.2d at 1126. As such, the issue of whether a serious injury exists is a factual determination that is to be left to the jury in all but the clearest of cases. *Robinson*, 750 A.2d at 341; *Kelly*, 734 A.2d at 898, *Furman*, 721 A.2d at 1126. That is to say, that if reasonable minds could not differ on whether plaintiff sustained a serious injury, then summary judgment is appropriate. *Kelly*, 734 A.2d at 898; *Furman*, 721 A.2d at 1126. Under a summary judgment inquiry, “ ‘the question to be answered is not whether appellant has adduced sufficient evidence to show that appellant suffered any injury; rather, the question is whether

appellant has shown that he has suffered a serious injury such that a body function has been seriously impaired.” *McGee*, 750 A.2d at 914 (quoting *Washington*, 719 A.2d at 741).

A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. Summary judgment may be properly granted “when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law.” *Rauch v. Mike-Mayer*, 783 A.2d 815, 821 (Pa. Super. 2001); *Godlewski v. Pars Mfg. Co.*, 597 A.2d 106, 107 (Pa. Super. 1991). The movant has the burden of proving that there are no genuine issues of material fact. *Rauch*, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record “in the light most favorable to the non-moving party accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences.” *Godlewski*, 597 A.2d at 107 (quoting *Hower v. Whitmak Assoc.*, 538 A.2d 524 (Pa. Super. 1988)). Summary judgment will only be entered in cases that “are free and clear from doubt” and any “doubt must be resolved against the moving party.” *Garcia v. Savage*, 586 A.2d 1375, 1377 (Pa. Super. 1991).

Summary judgment may be properly entered if the evidentiary record “either (1) shows that the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense.” *Rauch*, 783 A.2d at 823-24; *see also*, Pa.R.C.P. 1035.2. If the defendant is the moving party bringing the motion under Pa.R.C.P. 1035.2(2), then “he may make the showing necessary to support the entrance of summary judgment by pointing to material which indicates that the plaintiff is unable to satisfy an

element of his cause of action.” *Id.* at 824. “Conversely, the [plaintiff] must adduce sufficient evidence on an issue essential to [his] case and on which [he] bears the burden of proof such that a jury could return a verdict favorable to the [plaintiff].” *Ibid.* If the plaintiff fails to establish a *prima facie* case, then summary judgment is proper as a matter of law. *Ack. v. Carrol Township*, 661 A.2d 514, 516 (Pa. Cmwlth. 1995).

The overall question that must be decided in this Motion is whether Hubbard has produced enough evidence that would permit reasonable minds to differ as to whether he has suffered a serious injury. As part of that inquiry, the Court must determine whether a plaintiff in a limited tort case is required to provide expert testimony establishing that he suffered a serious injury, and, if not, must a plaintiff still establish a serious injury through objective medical evidence.

On the expert testimony issue, the Court concludes that a plaintiff in a limited tort case is not required to produce expert testimony stating that he has suffered a serious injury. The Court has been unable to find any case in which such a requirement was imposed upon a plaintiff. As to the objective medical evidence requirement, things are a little murkier.

In *Dodson v. Elvney*, the Superior Court required that a plaintiff demonstrate that reasonable minds could differ as to whether he suffered a serious injury by objective medical evidence and stated that subjective evidence was insufficient. 665 A.2d 1222, 1233 (Pa. Super. 1995). In *Washington, supra*, the Pennsylvania Supreme Court overruled *Dodson* in part by holding that the traditional summary judgment standard shall be applied to limited tort cases and a judge shall not make a threshold determination of whether a plaintiff has suffered a serious injury unless reasonable minds could not differ. *Washington* did not address

the requirement of objective medical evidence imposed by the Superior Court in *Dodson*. Regarding medical evidence, *Washington* said, “Generally, medical testimony will be needed to establish the existence, extent, and permanency of the impairment” 719 A.2d at 740. While *Washington* did not expressly impose an objective medical evidence requirement, it did not expressly reject it and overrule *Dodson* in this regard.

The implication from *Washington* is that objective medical evidence is not a requirement to establish a serious injury in a limited tort case. *Washington* states that medical testimony regarding the existence, extent, and permanency of the impairment will be *generally* required, not that it will always be required. If the Supreme Court intended to impose the objective medical evidence requirement, then it would have used stronger language, which would indicate that it was part of a plaintiff’s *prima facie* case regarding the serious injury. What the Supreme Court did in *Washington* was recognize that a plaintiff stands a better chance of proving that a serious injury exists if there is objective medical evidence to support the claim.

Despite how this Court may interpret the language of *Washington*, the Superior Court has continued to impose the objective medical evidence requirement. In *McGee v. Muldowney*, the Superior Court held that reasonable minds could not differ that the plaintiff had not suffered a serious injury. 750 A.2d at 915. In doing so, the Superior Court noted that the plaintiff:

failed to present objective medical evidence as to the degree of impairment and extent of pain suffered during the five years preceding those answers to the motion for summary judgment. The subjective allegations presented by appellant, in the absence of objective medical evidence, do not permit a finding that appellant suffered the requisite ‘serious injury.’

Ibid.

In light of *Washington* and *McGee*, it is unclear whether a plaintiff in a limited tort case is required to prove the existence of a serious injury through objective medical evidence. However, the resolution of that issue may be left to another day. Hubbard has produced sufficient evidence, including objective medical evidence, that would permit reasonable minds to differ as to whether he has suffered a serious injury as a result of the September 29, 2000 motor vehicle accident.

Hubbard claims that he has suffered injury to his lower back because of the motor vehicle accident. The injury to his lower back causes significant pain, which he has described as throbbing and aching. Defendant's Motion for Partial Summary judgment, Exhibit 9 (Gibson Rehabilitation Center treatment Chart, 3). Because of the pain, Hubbard says that his ability to walk, sleep, and ride in a car has been seriously and adversely affected.

Hubbard has testified that his ability to walk has been impaired by the back pain. He stated that it was easier to walk before the accident because there was less pain. Plaintiff's Deposition, 48 (November 7, 2003). He said that he could walk the same distance as before, but there is a lot more pain. *Id.* at 52. Hubbard stated that he endures the pain and covers the same distance because he has to.

As to sleeping, Hubbard testified that the pain prevents him from sleeping in a bed for more than one to two hours. Plaintiff's Deposition, 46, 72. Hubbard stated that he would get out of bed and go to the bathroom to apply liniment to his back. *Id.* at 56. Afterward, he will go to his reclining chair and get a couple of hours of sleep.

Regarding driving, Hubbard testified that the back pain affects his ability to endure long drives. Hubbard testified that he still drives around Williamsport, without any apparent problems. Plaintiff's Deposition, 56. The problem is long distance drives. Hubbard says when driving from Williamsport to Florida he cannot sit in the car for more than an hour or about 100 miles. *Id.* at 69-70. Hubbard says that prior to the accident he could have gone straight through to Farmington, North Carolina, where they stop overnight, if he wanted to. *Ibid.* Hubbard acknowledges that, prior to the accident, he did stop every 100 miles to stretch and take care of needs. Hubbard further testified that stopping was not the result of lower back pain. *Id.* at 76. Prior to the accident, Hubbard and his wife would take turns driving. For the last three or four years, Hubbard's son has driven him and his wife back and forth to Florida because of Hubbard's back pain.

There is objective medical evidence that could support a finding that Hubbard had suffered a serious injury. The emergency room record from Hubbard's September 30, 1999 visit notes that Hubbard said he was in a motor vehicle accident and that there was tenderness in his lower back. Defendant's Motion for Partial Summary Judgment, Exhibit 5. A report of Dr. Gandy's dated October 9, 2000 notes that Hubbard called complaining of back pain from a motor vehicle accident and wanted physical therapy. An appointment was set up with Dr. Young Park for the physical therapy. The Gibson Rehabilitation Center Treatment Chart dated October 17, 2000 notes that Hubbard was suffering from low back pain. In an Attending Physician's Report, Dr. Park notes that the condition Hubbard had been diagnosed with was low back strain. Defendant's Motion for Partial Summary Judgment, Exhibit, 6. In that report, Dr. Park sets forth a description of the pain as relayed to him by Hubbard –

localized in lower back area, but at times radiates into the right lower extremity, especially when he wakes up; the pain lessens when Hubbard is up and moving; long sitting followed by sitting aggravates his pain.

In an October 11, 2000 letter to Dr. Gandy, Dr. Park gave as his impression that Hubbard's low back pain was "most likely due to lumbosacral myoligamentous strain following the motor vehicle accident and also contributing factors are his high obesity and degenerative joint disease." Defendant's Motion for Partial Summary Judgment, Exhibit 6. Dr. Park felt it would be best to treat Hubbard conservatively using therapeutic heat, low back exercise and reviewing proper body mechanics. That letter also notes that Dr. Park prescribed additional pain medication, Mobic. The October 31, 2000 letter of Dr. Park to Dr. Gandy notes the improvement in Hubbard's condition. Dr. Park notes that the Mobic helps Hubbard's pain significantly. He notes that Hubbard does not show any significant distress, no significant tenderness along the lumbosacral or sacroloac joint area, and Hubbard does not walk with antalgic gait. Based on this, it was Dr. Park's impression was that the lower back pain was improving. In a November 16, 2000 letter to Dr. Gandy, Dr. Park again expresses his impression that the lower back pain is improving. He notes that Hubbard said he feels better, is able to stand and walk without signs of discomfort, and has better low back movement. Dr. Park noted that there was no low back tenderness. Dr. Park said that Hubbard understood the need to keep up with the back exercises and for proper body mechanics. Dr. Park gave an additional prescription of the Mobic for pain. Dr. Park also said that he would be more than glad to see Hubbard as needed.

Viewing the evidence in the light most favorable to Hubbard, reasonable minds could differ on whether he has suffered a serious injury. One view of the evidence is that Hubbard has suffered a serious back injury stemming from the motor vehicle accident, which has adversely impacted important aspects of his life and for which he has and continues to undergo medical treatment for in the form of physical therapy. Hubbard's testimony is that this lower back pain has adversely affected his mobility, ability to ride long distances in a car, and his ability to sleep in a bed form more then two hours. He has more pain when he walks, can only sleep in a bed two hours before he must get up, apply liniment to his back, and sleep in a recliner, and can only ride in a car for about one hour or one hundred miles at a stretch. The lower back pain he is experiencing has lasted from the day after the accident until the present. The treatment Hubbard has received for the back pain has been medication and physical therapy. The treatment of his back pain is on going as he continues to under go physical therapy. Taken as true, this evidence could permit a jury to conclude that the lower back injury was serious as it seriously impairs Hubbard's ability to sleep and to ride in a car, the impairment has lasted since the accident, and the treatment for the injury has been continuous.

The medical evidence produced could also support a determination that Hubbard has suffered a serious injury. Several of the medical records indicate that Hubbard was suffering from a low back injury. They also indicate that the pain was of such a degree that medication was prescribed and treated with physical therapy. Dr. Young did note that Hubbard's lower back pain was improving, but there is no indication from his letters that the pain had completely resolved. Giving Hubbard the benefit of all reasonable inferences, this

could merely be evidence of how the therapy temporarily alleviated some of the pain. Hubbard testified that the physical therapy helped him tremendously and that he felt better afterward, but the pain would always return after the therapy. Plaintiff's Deposition, 38, 44, 46. In any event, the medical records allow a conclusion to be drawn that Hubbard had suffered a lower back injury and that he was undergoing treatment for the pain in his lower back.

The issues raised by Young do cast doubt on whether Hubbard has suffered a serious injury. However, a jury must resolve that doubt. Whether Hubbard's other health problems are the source of his difficulties, whether Hubbard is actually limited more than he was prior to the accident because of any lower back pain, and whether the treatment he received resolved the pain are all questions the jury will have to consider when making the determination as to whether Hubbard has suffered a serious injury. The issues raised by Young and the evidence presented by Hubbard demonstrate that reasonable minds could differ as to whether Hubbard has suffered a serious injury; therefore, summary judgment is inappropriate.

Accordingly, the Motion for Partial Summary Judgment is denied.

ORDER

It is hereby ORDERED that the Motion for Partial Summary Judgment of Defendant Hilda J. Young filed April 20, 2004 is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: David B. Lingenfelter, Esquire
David C. Raker, Esquire
Judges
Christian J. Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)