

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 NORTH KING STREET, SUITE 10400  
WILMINGTON, DE 19801-3733  
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January 30, 2009

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RE: Delores A. Hinson and Juanita Scott v. Margarete R. Johnson  
C.A. No. 06C-11-298 RRC

Submitted: October 29, 2008

Decided: January 30, 2009

On Plaintiff Hinson's Motion for New Trial and/or Additur.  
ADDITUR GRANTED.

On Plaintiff Scott's Motion for New Trial and/or Additur.  
DENIED.

Dear Counsel:

The above-captioned case involved a claim for personal injuries relating to an automobile accident that occurred on April 13, 2005. A jury trial in the matter was conducted on September 15 and 16, 2008 in which liability was admitted, and the only issue for the jury was whether the damages claimed were caused by the accident in question and, if so, the amount of those damages. The jury returned

the verdict on September 16<sup>th</sup> and failed to award damages to the Plaintiffs. The Plaintiffs have now filed a Motion for a New Trial and/or Additur.

Complicating what would normally be a routine damages case was the fact that both Plaintiffs had multiple prior instances in which they had suffered injuries. Ms. Hinson had been involved in four previous automobile accidents and both Plaintiffs were on social security disability and had not worked for years as a result of previous accident related injuries. It is with this backdrop that the jury was asked to decide whether the injuries alleged were related to the accident in April, 2005 which was the subject of this litigation.

Adding to the difficulty of the jury's task was the fact that the Defendant chose to present no medical testimony to contest the testimony presented by the Plaintiffs' medical doctors. Therefore, while the credibility of the Plaintiffs' subjective complaint would clearly be suspect based upon their accident history, the objective findings of the doctors were not disputed by the Defendant. Thus, the issue for the Court to decide is whether the facts of this case fall within the trilogy of Supreme Court cases, *Maier*, *Amalfitano* and *Burkett-Wood*, which require an award of damages.

The Supreme Court's rulings in *Maier* and *Amalfitano* were outlined in the *Burkett-Wood* case as follows:

In *Maier*, we held that when the evidence establishes that an accident caused injuries, a jury is required to return a verdict of at least minimal damages. In *Amalfitano*, we held that "where medical experts present *uncontradicted* evidence of injury, confirmed by objective medical tests supporting a plaintiff's subjective testimony about her injuries and offer opinions that the injuries relate to the accident about which the plaintiff complains, a jury award of zero damages is against the weight of the evidence."<sup>1</sup>

Later in the opinion the Supreme Court noted that

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<sup>1</sup> *Burkett-Wood v. Haines*, 906 A.2d 756, 765 (Del. 2006) (quoting *Amalfitano v. Baker*, 794 A.2d 575, 576 (Del. 2001) (citation omitted).

“[A]n MRI, an X-ray, and spasm revealed on palpation to a physical examination are considered objective medical evidence in this jurisdiction.”<sup>2</sup>

In the case before the Court, Dr. Atkins testified that he treated Ms. Hinson approximately six days after the motor vehicle accident from which she complained of pain in her neck and mid and low back and she had difficulty standing and ambulating. The following is the doctor’s testimony as to the physical exam that he performed on Ms. Hinson on that date.

Q. Did you perform a physical examination of her?

A. Yes.

Q. Let me just ask you to focus on the neck first, please. What were your findings with respect to range of motion?

A. It was markedly restricted.

Q. Did you find any tenderness in her neck area when you examined it?

A. Yes.

Q. And to find that tenderness, you actually touched the neck muscles?

A. Yes.

Q. And she complained to you that that hurt?

A. Yes.

Q. Your exam note also indicates that there was spasm; is that correct?

A. Yes.

Q. What is spasm?

A. Increased muscle tone over the particular muscles palpated.

Q. Is that something the patient can control?

A. No.

Q. Is it considered an objective finding?

A. Yes.

Q. Why does the body go into spasm?

A. The muscles are injured and trying to prevent further injury and overstretching.

Q. You also examined her neck, did you not?

A. Yes.

Q. It looks like there was decreased range of motion - - I’m sorry, Doctor. I misspoke. I said neck. I meant to say back.

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<sup>2</sup> *Id.* at 766.

- A. Yes.
- Q. Was there also a decreased range of motion of the back?
- A. Yes.
- Q. Was her back musculature also tender when you touched it?
- A. Yes.
- Q. And was there also spasm in the back area?
- A. Yes.
- Q. Again, that being an involuntary reaction to injury?
- A. Correct.
- Q. You also noted that there was a positive straight leg raising test. What is that test and what does it tell you when it's positive?
- A. It tells you that there's some irritation of the nerve rootlets in the lower back region and injury in that particular area.
- Q. Did you also examine her knees?
- A. Yes.
- Q. What were your findings there?
- A. She had tenderness over her knees.
- Q. What was your diagnosis, after having heard from her what her problems were and then having examined her?
- A. Cervical, thoracic and lumbosacral strain and sprain, bilateral knee sprains and cervical radiculitis.<sup>3</sup>

Ms. Hinson was started on a treatment of therapeutic modalities including heat packs, ultrasound, electric stimulation and hydromassage. A subsequent MRI showed multiple disc bulges and cord compression in her neck. While the doctor opined that the conditions reflected in the MRI existed prior to the accident, he testified that the accident aggravated these preexisting conditions.

As a result of the above, the Court finds that the Plaintiff has presented uncontradicted objective medical testimony that mandates that some monetary award be made to Ms. Hinson. Therefore, the Court awards additur for the uncontested medical bills and pain and suffering in the amount of \$8,050.00.

Juanita Scott was the passenger in Ms. Hinson's vehicle. Several days after the accident she saw Dr. McIlrath, a chiropractor, and his treatment notes of April 20, 2005 reflect his objective finding as follows:

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<sup>3</sup> Atkins Dep. 8:15 - 11:6, Sept. 9, 2008.

There is tenderness on palpation at the thoracolumbar lumbar, and lumbosacral vertebrae. Positive spasm at the paravertebral muscles, quadratus lumborum and upper gluteal musculature is present. Range of motion is restricted segmentally at the lumbar and lumbosacral region. Joint fixations are noted throughout.<sup>4</sup>

Similar findings are reflected throughout his medical records from April, 2005 into 2006 and 2007.

The Court, however, has reviewed the trial testimony of Dr. McIlrath, and it is not clear that the objective findings that were made are undisputably in reference to the present accident. Dr. McIlrath had been treating Ms. Scott for at least three years prior to this accident, and it appears she had not fully recovered from her earlier injuries. As such, even though objective medical findings were made by the doctor, including spasms and an MRI reading, there remained a dispute as to whether these findings were connected to this accident. As such, this was properly a causation issue for the jury to decide, and the award of no damages is supported by the evidence and will not be disturbed.

As a result of the above, the Court grants Plaintiff Hinson's Motion for Additur and denies Plaintiff Scott's request for a new trial or additur.

Sincerely yours,

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Christy Magid, Civil Case Manager

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<sup>4</sup> Pl.'s Ex. 3 at Tab 2.