IN THE SUPERIOR COURT OF PENNSYLVANIA

MIDDLE DISTRICT

Docket No 652 MDA 2002

Kelly Sekol,
Appellant

vs.

James P. Albrecht,
Appellee

BRIEF OF APPELLEE

Appeal from Order Entered March 27, 2001
to Docket No. 99 – CV – 1434
in the Court of Common Pleas of Lackawanna County

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COUNTER-STATEMENT OF QUESTION INVOLVED

Whether the trial court's Opinion and Order granting the Motion for Summary Judgment filed by the Defendant, James P. Albrecht, on the limited tort issue should be affirmed as reasonable minds could not differ in the conclusion that the Plaintiff failed to establish that her injuries breached the limited tort threshold where the Plaintiff allegedly suffered soft tissue injuries to her neck, right shoulder, and low back, along with a clinically insignificant slight bulge at the level of C4-5, had minimal treatment which did not involve any specialists, and where the Plaintiff failed to present any evidence of a serious impairment of any body function that affected her ability to work or her ability to perform her normal daily activities.

LOWER COURT GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ON QUESTION INVOLVED.

COUNTER-STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Plaintiff filed a Complaint in the above-referenced matter alleging personal injuries arising out of a motor vehicle accident which occurred on or about May 23, 1997. (**R. 3a-8a**). The Defendant, James Albrecht, filed an Answer and New Matter to the Complaint essentially alleging that the Plaintiff's injuries did not breach the limited tort threshold. (**R. 13a**). After discovery, the Defendant, James Albrecht, filed a Motion for Summary Judgment and Supporting Brief on the limited tort issue on September 12, 2000. (**R. 74***)*. By Memorandum and Order dated March 23, 2001, the trial court Judge Terrence Nealon granted the Defendant's Motion for Summary Judgment. (**R. 166a-178a**). On August 23, 2001, Judge Nealon denied the Plaintiff's Motion for Reconsideration and/or Motion to Certify the Interlocutory Order for Appeal. (**R. 221a**). By Order dated March 27, 2002, Judgment was entered in favor of the Defendant, James P. Albrecht and against Plaintiff by agreement on all remaining claims. (**R. 224a**). This appeal followed.

B. STATEMENT OF FACTS

As the trial court aptly summarized the facts in its March 23, 2001 Memorandum, the Memorandum will essentially be paraphrased hereafter. (**See R. 167a-169a**). On May 22, 1997, the Plaintiff was involved in an automobile accident as she was exiting a supermarket parking lot onto South Washington Avenue in Scranton and was struck by a vehicle operated by the Defendant. (**R. 167a**). At the time of the accident, the Plaintiff

was insured under an automobile insurance policy in which she had selected limited tort coverage. (**R. 167a; 92a-93a**). The Plaintiff alleged that she sustained neck, right shoulder and low back injuries as a result of the accident. (**R. 168a; 43a-44a**).

The Plaintiff did not lose consciousness during the accident, was able to get out of her vehicle under her own power, and was able to discuss the accident with the Defendant. (**R. 67a-71a; 161a**). Immediately after the collision, the Plaintiff was able to drive her vehicle from the accident site to her mother's residence. (**R. 167a; 71a**). Her mother later drove her to the emergency room for treatment. (**R. 167a; 71a-72a**). At the emergency room, the Plaintiff's care consisted largely of an obstetrical evaluation as she was five months pregnant, after which she was released. (**R. 167a; 36a-40a**).

Five days after the accident, the Plaintiff was involved in an altercation with another woman on May 27, 1997, during which she was pushed against a building and bruised her back. (**R. 161a; 40a-43a**). The Plaintiff did not receive any further treatment until June 2, 1997, when she was examined by her family physician, Patrick D. Conaboy, M.D. (**R. 161a**.).

According to the Plaintiff's family doctor's report, the doctor's original diagnosis on June 2, 1997, "was severe low back and right shoulder strain" for which he prescribed physical therapy and Tylenol #3. (**R. 161a; 168a**). At the time of her second examination on September 8, 1997, the Plaintiff "demonstrated decreased lateral range of motion in the neck" but her "[n]eurologic exam was intact" and Dr. Conaboy "recommended that she continue conservative treatment at the time with physical therapy for one more month and that she be seen immediately following delivery [of her child]." (**R. 161a-162a; 168a**).

The Plaintiff returned to Dr. Conaboy on November 6, 1997, and except for the presence of "spasm in the right trapezius muscle and pain with compression of the C-spine," her physical examination "was stable" and "demonstrated good grip strength bilaterally." (**R. 162a; 168a**). An MRI scan was performed on November 8, 1997, which "was essentially within normal limits except for a subtle herniation at C4-C5" with "no encroachment of the canal and no true herniation." (**R. 162a; 168a**). Consequently, Dr. Conaboy concluded that the MRI finding "was most probably of minimal clinical significance." (**Id**.).

The Plaintiff did not return to Dr. Conaboy until eight (8) months later in July of 1998. (**R. 162a; 168a-169a**). Although the Plaintiff complained at the time of having "developed severe headaches and then aches/pains throughout a great deal of her body," Dr. Conaboy had opined that "[i]t is difficulty to say what part of this pain is a result of the MVA [motor vehicle accident]." (**R. 162a; 169a**). Dr. Conaboy further concluded that the Plaintiff "[was] recovering quite well and no longer require[d] any physical therapy" or treatment other than the occasional non-steroidal medication. (**Id**.). Additionally, the medical records revealed that the Plaintiff has never been referred to any type of medical specialist for a consultation or evaluation. (**R. 52a**.).

In July of 2000, the Plaintiff underwent a medical exam at the request of the Defendant with Dr. Peter A. Feinstein, an orthopedic surgeon. (**R. 132a-142a**). Dr. Feinstein concluded that it appeared that the Plaintiff suffered a contusion-type of injury, or bruises, to the neck and right shoulder areas, during the subject accident that resolved without complications and without ever imposing significant limitations on the Plaintiff's ability to work or engage in her usual daily activities. (**Id**.).

The Plaintiff testified that, as a result of her accident, she missed two (2) to four (4) days of work. (**R. 25a; 27a; 134a**). She also admitted that, other than complaints that she could not play ball with her children and that headaches affected her performance of daily activities, she was able to take care of her children, perform household chores, and complete grocery shopping. (**R. 47a-49a; 136a**).

SUMMARY OF ARGUMENT

Judgment in favor of the Defendant, James P. Albrecht, should be affirmed. The trial court, under the Honorable Terrence Nealon, properly entered summary judgment in favor of the Defendant on the limited tort issue.

The record reveals that the trial court properly found that no reasonable minds could differ on the conclusion that the Plaintiff did not suffer a "serious injury" as that term is defined by the law. The evidence revealed that the Plaintiff suffered soft tissue injuries and had a clinically insignificant bulge at C 4-5. The Plaintiff's treatment was minimal and sporadic, consisting of an emergency room visit (which focused on her pregnant state), physical therapy, and four visits with her family doctor over the course of a year and two months. She had no overnight hospitalizations, no referrals to any specialist other than a defense exam with an orthopedist, and no recommendation of surgery.

More importantly, the evidence failed to reveal any serious impairment of any body function. The Plaintiff did not lose consciousness as a result of the accident and was able to get out of her car under her own power at the scene and discuss the accident with the Defendant. The Plaintiff admittedly only missed two (2) to four (4) days of work as a result of her alleged injuries. She further admitted that, even as a single mother, she was able to continue to care for her children, perform housework, and complete grocery shopping.

Thus, the trial court's entry of Summary Judgment should be affirmed as there are no genuine issues of material fact and the Defendant is entitled to judgment as a matter of law under the facts presented.

ARGUMENT

The background of the law surrounding the limited tort issue was set forth in ***Robinson v. Upole*, *750 A.2d 339, 342 (Pa. Super. 2000)***, as follows:

> In 1990, the legislature amended the MVFRL to allow insured motorists the opportunity of choosing a "limited tort" option in exchange for presumably lower insurance rates. Under this option, an insured that is injured by another driver "may seek recovery for all medical and other out-of-pocket expenses, but not for pain and suffering and other non-monetary damages unless the injuries suffered fall within the definition of "serious injury" as set forth in the policy." ***75 Pa.C.S.A. §1705(a).*** In other words, "[u]nless the injury sustained is a serious injury, each person who is bound by the limited tort option shall be precluded from an action for any non-economic loss, except that [in circumstances inapplicable to the present matter]" ***Id. §1705 (d)***. The MVFRL defines "serious injury" as "[a] personal injury resulting in death, serious impairment of body function or permanent serious disfigurement." ***Id. §1702***.

Under its decision in ***Washington v. Baxter*, *719 A.2d 733, 740 (Pa. 1998)***, the Pennsylvania Supreme Court held that whether an injury is serious is an issue that can be summarily decided by the trial court when "reasonable minds could not differ as to whether a serious injury has been established." The **Washington** Court set the parameters for deciding whether or not a plaintiff has sustained a "serious impairment of body function." The Supreme Court adopted the following analysis:

> The "serious impairment of body function" threshold contains two inquiries:
>
> > a) What body function, if any, was impaired, because of injuries sustained in a motor vehicle accident?
> >
> > b) 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, 719 A.2d at 740 [citation omitted].

The trial court correctly held that the Plaintiff failed to present evidence to allow her to take the issue of whether or not she sustained a serious impairment of body function to a jury. In its detailed and well-reasoned opinion addressing the applicable standard of review, the trial court was sure to emphasize that the issue presented was one that "should routinely be left for the jury." **(R. at 170a *quoting Coughlin v. Miljack, Inc., 45 D. & C. 4th 504, 512 (Erie Co. 2000)).*** Trial court Judge Nealon also acknowledged up front that the "threshold determination was not to be made routinely by the trial court judge…." ***(R. at 170a quoting Washington, 719 A.2d at 740)***. Nevertheless, the trial court properly found that, under the facts presented, no reasonable minds could differ that the Plaintiff did not sustain a serious injury as that term has been defined by the law and, therefore, summary judgment was appropriate. **(R. at 5, 11).**

The Plaintiff's Complaint alleged that the Plaintiff suffered neck and right shoulder injuries as a result of the accident. **(R. at 6a).** Discovery confirmed that the Plaintiff was claiming injuries to her neck and right shoulder, along with low back pain and headaches. However, the records reveal that the Plaintiff had a pre-existing history of

migraine headaches and further, that she was involved in an unrelated altercation five (5) days after the accident during which she was pushed against a building and bruised her back. (**R. 133a; 161a**).

With regards to the subject accident, the Plaintiff did not suffer any loss of consciousness. (**R. 67a–71a; 161a**). The Plaintiff was able to get out of her vehicle under her own power at the scene and discuss the accident with the Defendant. (**Id**.). The Plaintiff did not have any treatment at the scene and did not take an ambulance to the emergency room. (**R. at 70a**). Rather, the Plaintiff was able to drive her vehicle from the scene of the accident to her mother's house before being taken to the emergency room by her mother. (**R. 71a**).

The Plaintiff was treated and released from the emergency room on the day of the accident. The emergency room care consisted largely of an obstetrical evaluation in light of the Plaintiff's pregnancy. (**R. 36a-40a**). Fortunately, the Plaintiff's pregnancy was not significantly affected by the accident. (**Id**.). The initial evaluation of the Plaintiff's neck and shoulder revealed some tender spots, but no pain. (**R.161a**). The Plaintiff was never hospitalized overnight for accident-related reasons and also never had any surgery recommended for any reason related to the accident. (**R. 46a; 46a-47a**).

As noted, the records reveal that five (5) days after the accident, the Plaintiff was involved in a physical altercation during which she was pushed against a building and injured her back. (**R. 161a; 133a**). Thereafter, she began to report increased pain to the family doctor, Dr. Patrick Conaboy. (**Id**.). At the initial June 2, 1997 visit with her family doctor, five (5) days after her physical altercation, the doctor noted, for the first time, a limited range of motion in the neck, decreased patellar tendon reflexes on the

right, muscle tightness on the right side of the neck, multiple tender spots in the back and in the lumbosacral area. (**Id**.). The Plaintiff was diagnosed with a severe low back and right shoulder strain, prescribed Tylenol #3 and referred to physical therapy. (**Id**.).

The Plaintiff reported that, a month later, in July of 1997, she fell and suffered some irritation in the tailbone region. (**R. 133a; 162a**). However, she denied that this incident had any impact on her situation. (**R. 133a**).

By the time of her second visit with the family physician three (3) months later, the Plaintiff was eight (8) months pregnant. Although the Plaintiff noted neck pain, the doctor found her "[n]eurologic exam was intact." (**R. 162a**.). The Plaintiff was advised to continue with her "conservative treatment" and her physical therapy, and to return after the birth of her child. (**Id**.).

The Plaintiff returned to the family doctor two (2) months later and, except for the presence of "spasm in the right trapezius muscle and pain with compression of the C-spine," the Plaintiff's physical exam "was stable" and the Plaintiff "demonstrated good grip strength bilaterally." (**R. 162a**). The Plaintiff was referred for an MRI on November 8, 1997 which "was essentially within normal limits except for a subtle herniation at C4-C5" with "no encroachment of the canal and no true herniation." (**Id**.). Dr. Conaboy noted that the MRI results were "most probably of minimal clinical significance." (**Id**.). The defense medical expert, Dr. Peter A. Feinstein, M.D. stated in his report that the MRI was "read as some disc bulging at the C4-5 level but no evidence of nerve compression or herniated disc." (**R. 132a**). Note that the Plaintiff only alleged "subtle bulging of the C-4-5 Disc" in her Complaint. (**R. 6a**).

The Plaintiff did not return for follow-up treatment with her family doctor until eight (8) months later in July of 1998. (**R. 162a**). Although the Plaintiff indicated that she had severe headaches and aches and pains throughout a great deal of her body, Dr. Conaboy stated that it was "difficult to say what part of this pain is a result of the MVA [motor vehicle accident]." (**Id.**)[**bracket inserted**]. He further noted that, with respect to her various complaints, the Plaintiff was "recovering quite well and no longer requires any physical therapy." (**Id**.).

Accordingly, the record reveals that the only minimal treatment the Plaintiff received as a result of the accident was an emergency room visit (which focused on her pregnancy), a brief course of physical therapy, and four (4) sporadic visits with her family physician spread out over the course of a year and two months following the accident. (**R. 161a-162a**). Additionally, during her course of treatment, the Plaintiff was never referred to any specialists for a consultation or further evaluation. (**R. 52a**). The medical evidence establishes that the Plaintiff had soft tissue injuries to her neck and right shoulder, along with a C4-5 pathology without any clinical significance (**R. 161a-162a; 133a**). The medical records also reveal that no bony pathology that without any restrictions were placed on the Plaintiff by her family doctor with regards to work or daily activities. (**R. 161a–162a; 136a–137a**).

On July 6, 2000, the Plaintiff underwent a defense medical exam conducted by Dr. Peter A. Feinstein, who was an orthopedic surgeon and the first specialist the Plaintiff was ever referred to in relation to the accident. (**R. 132a–137a**). It is established that the

trial court may consider expert reports in the context of summary judgment proceedings. ***See* 3 *Goodrich-Amram 2d* §1035.3(a):6 (1998); *See also* *Welsh v. Bulger*, 698 A.2d 581 (Pa. 1997); *Smith v. PennDOT*, 700 A.2d 587, 591-592 (Pa. Cmwlth. 1997)**.

Dr. Feinstein indicated in his report that the Plaintiff stated during her history that she was the divorced mother of three young children and that she was able to take care of the children, complete the housework, and perform the grocery shopping. (**R. 134a**). The Plaintiff further admitted that her neck and shoulder were the only alleged problems from the automobile accident and that those problems had not affected her activities of daily living. (***Id.*)**.

Dr. Feinstein found that the Plaintiff had an entirely normal physical examination. (**R. 134a**). The right shoulder and cervical regions had full ranges of motion. (**R. 135a**). Dr. Feinstein concluded, after his exam and review of the medical records, that it appeared that the Plaintiff had suffered a myofascial or bruise or contusion to the neck and right shoulder regions as a result of the accident. (**R. 136a**). However, there were no objective findings to confirm any residual or ongoing problems in those areas. (***Id***.).

Dr. Feinstein further found that any complaints of headaches would "clearly not be related as [the Plaintiff] had a pre-existing history of migraine headaches and had further subsequent trauma several days later that involved a physical assault." (***Id***.). Finally, Dr. Feinstein opined that the Plaintiff had made a full and complete recovery in terms of any alleged injury to the neck and shoulder areas. (***Id***.)

Dr. Feinstein emphasized that his conclusion of complete recovery was confirmed by the fact that the Plaintiff was "working regular duty, is taking care of three young children at home and, by her own history, does the grocery shopping and housework."

(***Id***.). The doctor added that the Plaintiff was not taking any prescription medication for any accident-related condition. (***Id***.).

As noted by the trial court below, when conducting a "serious injury" analysis, while relevant, the focus is not on the injury itself, but rather the nature and extent of the impairment resulting from the injury. (**R. 233a *citing* *Robinson v. Upole*, *750 A.2d 339, 343 (Pa. Super. 2000)).** The trial court was aware that a soft tissue injury may constitute a "serious impairment of a body function" if it sufficiently interfered with a body function. **(R. 233a *citing* *Chanthavong v. Tran*, *682 A.2d 334, 341 (Pa. Super. 1996)).** Trial court Judge Nealon also acknowledged that a plaintiff may suffer an objectively identifiable injury such as a broken bone or a disc pathology, but not sustain a "serious injury" if it does not adequately impair a body function. **(R. 233a *citing with "See e.g." signal* *Sprankle v. Brown*, *44 D. & C. 4th 314 (Ind. Co. 1999) and* *Stefanou v. Pearce*, *41 D. & C. 4th 505 (Leh. Co. 1999)).**

The trial court further noted that an impairment need not be permanent in order to qualify as serious. **(R. 235a *citing* *Leonelli v. McMullen*, *700 A.2d 525, 527-28 (Pa. Super. 1997);* *Murray v. McCann*, *658 A.2d 404, 408 n. 3 (Pa. Super. 1995)).** Additionally, a return to employment and/or a discontinuance of medical treatment will not foreclose the existence of a "serious injury" in every case. **(R. 235a *citing* *Robinson*, *750 A.2d at 343;* *Kelly v. Ziolko*, *734 A.2d 893, 900 (Pa. Super. 1999);* *Furman v. Shapiro*, *721 A.2d 1125, 1127 (Pa. Super. 1998) and* *Leonelli*, *700 A.2d at 529.).**

With the above standards in mind during his analysis of the extent and duration of the Plaintiff's alleged impairment, Judge Nealon correctly concluded that reasonable minds could not differ on the determination that the Plaintiff had not suffered a "serious

injury." It is respectfully submitted that this Court should affirm the trial court's decision as there was no serious impairment of any body function.

At the time of the accident, the Plaintiff was employed on a full-time basis by the Moses Taylor Hospital as a phlebotomist and only missed two (2) to four (4) days of work after the accident. **(R. 25a; 27a; 134a).** Plaintiff also testified that there were no modifications made to her job in light of her alleged injuries. **(R. 28a).**

After July of 1999, the Plaintiff was employed by Allied Services as a caretaker of elderly residents. **(R. 49a–50a).** In that position, the Plaintiff changed the clothing of the residents, washed them, and provided them with other personal hygiene. **(R. 50a).** Although the Plaintiff admitted that regular lifting, bending, squatting and other similar activities were required by that job, she did not miss any time from her employment with Allied because of her alleged accident-related injuries. **(Id.).**

Finally, and most importantly under the above analysis, the Plaintiff was unable to give any concrete examples as to how her injury has impaired any body function. Plaintiff testified, as follows:

> Q. How have your accident-related injuries affected your ability to do the things that you do on a daily basis?
>
> A. Sometimes I can't, because I have pain; and I get migraines, I don't want to do anything
>
> **********
>
> Q. What, if anything, can't you do that you used to do before the accident?
>
> A. I'd like to do more, like, with my kids and - -
>
> Q. Can you give me a concrete example as opposed to just a general statement that "I'd like to do more"?

A. I would go out and play ball with them and do that sort of thing with them.

Q. Do you do that now?

A. Sometimes. Not all the time anymore.

Q. So not as frequently as you used to?

A. Right.

Q. Other than playing games or interacting with your children in that manner, what else have you either been prevented from doing or have changed because of your accident-related injuries?

A. That's basically - - just everyday living. Just everyday living things. That's about it.

Q. Can you give me any more concrete examples other than a general statement?

A. Sometimes just even cleaning my house, because I have a migraine headache; and I have to take care of my kids myself.

(**R. 47a; 48a-49a**).

As noted by Judge Nealon below, the only subjective limitations the Plaintiff could point to were complaints that she could not "go out and play ball" with her children as frequently as she did prior to the accident and that her headaches partially affected her ability to clean her home and care for her children. **(R. 175a *quoting* R. 47a–49a).** As noted above, these subjective complaints are not supported by the objective findings of the Plaintiff's own family doctor or the defense medical expert. Additionally, the Plaintiff admitted elsewhere that she has been able to care for her three young children, and complete the housework and grocery shopping. (**R. 136a**).

Under the above legal analysis, the Plaintiff has failed to present sufficient evidence to allow her to proceed to the jury on the limited tort issue. The evidence revealed that the Plaintiff suffered soft tissue injuries and had a clinically insignificant bulge at C 4-5 which required only minimal treatment and which never constituted a serious impairment of any body function. As noted by the trial court there have been numerous cases in which the appellate courts have affirmed the entry of summary judgment in cases in which it was found that a plaintiff had suffered more significant impairments than those being claimed by the Plaintiff in this matter. **(R. 176a *citing Washington, 719 A.2d at 735, 741 (plaintiff unable to return to second job for two months—summary judgment still entered); McGee v. Muldowney, 750 A.2d 912, 914-15(Pa. Super. 2000)(plaintiff referred to orthopedic specialist for six visits and prescribed several months of physical therapy—summary judgment still entered.); Accord Coughlin v,, 45 D. & C. 4th at 516-517 (summary judgment granted where plaintiff regained full employment within three months and her treatment was limited to osteopathic and chiropractic manipulations, physical therapy and pain medication).***

The trial court's comparison of the facts of this case to those in other cases, does not constitute impermissible fact-finding by Judge Nealon as alleged by Plaintiff, but rather a proper application of the doctrine of *stare decisis*. Other courts have properly compared and contrasted various limited tort decisions in rendering their own determination of the issue under the facts presented. **See e.g. Cipressi v. Mahoney, 36 Pa. D.&C. 4th 97, 100-102 (C.P. 1998)(1998 WL 788681); Kelly v. Ziolko, 705 A.2d 868, 873 (Pa. Super. 1997)**. The trial court also did not err, as suggested by Plaintiff, by referring to other incidents during which the Plaintiff was injured. Rather, the trial court

was properly considering the totality of the circumstances as required by the applicable standard of review**. See Washington, 719 A.2d at 740**.

Thus, it is respectfully requested that this Court affirm the trial court's proper finding that no reasonable minds could differ on the conclusion that, under the facts presented, the Plaintiff did not suffer a "serious injury" as the term is defined by Pennsylvania law. Accordingly, since the Plaintiff is not entitled to non-economic damages and since judgment was entered by agreement in favor of the Defendant on any economic claims, it is respectfully requested that the judgment entered in favor of the Defendant be affirmed.

CONCLUSION

For the above stated reasons, the Defendant respectfully requests this Court to affirm the entry of judgment in his favor.

Respectfully submitted,

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