

**Villanueva v. Zimmer, 2013 WL 3185260 (6/21/13)**

**A New Jersey Appellate Division Court holds that the plaintiffs were precluded from utilizing a Social Security Administration disability determination in a personal injury action.**

On October 28, 2005, the plaintiff was involved in a rear-end motor vehicle accident. The defendant Zimmer was stopped behind the plaintiff. The defendant DeRosa, driving a van, struck the rear of the Zimmer, pushing Zimmer's vehicle into the rear of the plaintiff's vehicle. The police responded and the plaintiff advised that she was OK and drove away from the scene. Later, the plaintiff felt sore and went to the emergency room.

About four months after the accident, the plaintiff began treatment with a chiropractor for back and neck pain. The plaintiff was referred to Dr. Kaul, a specialist in interventional pain and minimally invasive spine surgery. Dr. Kaul found the plaintiff had bilateral L5-S1 radiculopathy and tears in discs at L4-5 and L5-S1. The plaintiff underwent lumbar steroid injections. Eventually, Dr. Kaul recommended spinal fusion therapy; however, the plaintiff declined.

At trial, the plaintiff testified that she did not return to work as a seamstress because of pain and inability to perform her job functions.

The defense produced an orthopedic surgeon who testified that the plaintiff was 5'5" and weighed over 300 lbs. He found no objective evidence of injuries from the accident and that the plaintiff's back problems were common in overweight individuals. A radiologist testified that he had reviewed the MRI films and found they showed no evidence of herniated discs or annular tears, but did show age related disc degeneration.

On June 24, 2007, the Social Security Administration (SSA) issued a four-page Notice of Award finding that the plaintiff became disabled on October 28, 2005. Prior to trial, defense counsel filed an *in limine* motion seeking to preclude the plaintiff from introducing any evidence or testimony pertaining to the SSA disability determination. The plaintiff argued that the determination creates a rebuttable presumption that the plaintiff was disabled and unable to work as a consequence of the accident. The plaintiff also argued they should be able to cross-examine the defendant's orthopedic expert with the SSA findings. The trial court precluded the use of the SSA determination.

It should be noted that during closing arguments, defense counsel stressed that there was no medical testimony that the plaintiff was unable to work. Plaintiff's counsel objected and the court found the defense counsel had "opened the door." The jury was then advised that the plaintiff was determined to be disabled by SSA. The jury returned a unanimous verdict finding the plaintiff did not sustain an injury as a proximate result of the accident of October 28, 2005.

On appeal, the court first observed that they were not faced with the concepts of *res judicata* or collateral estoppel since the defendant was neither a party nor in privity with a party to the proceedings before the SSA.

The Appellate Court also noted that the SSA determination was hearsay. The court found that the only hearsay exception that may apply to the case was the public records exception under NJRE 803(c)(8). This evidentiary rule notes, “ (A) that a statement contained in a writing made by a public official of an act done by the official or an act, condition or event observed by the official if it was within the scope of the official’s duty either to perform the act reported or to observe the act, condition or event reported and to make the written statement.”

In rendering its decision, the court looked to Phillips v. Erie Lackawanna RR Co., 107 N.J. Super. 590 (App. Div. 1969), wherein the Appellate Division held the factual conclusions of the hearing examiner of the Public Utility Commission respecting the hazards posed by a particular grade crossing and the Board’s decision directing installation of protective lights and bells was hearsay and not admissible. The Phillips’ court noted that it is “clearly the intent of the drafters not to allow in evidence conclusionary material resulting from official investigations embodied in statements or reports of the official or agency involved.” The court also noted that under various Federal Districts and Circuits, the consensus is to favor the view that legal conclusions are not admissible as findings of fact under the Rule.

The Appellate Court also noted that the cornerstone of the public records exception is trustworthiness. In this case, a court must be cautious about the use of an administrative determination that may be predicated upon a different, more lenient standard. Thus the court found that NJRE 803(c)(8) does not authorize the admission of an SSA Determination of Disability as a hearsay exception.

Lastly, the court highlighted that the SSA Disability Determination is of dubious probative value in a personal injury action. The lack of a meaningful adversarial process with respect to the cause, existence and extent of the plaintiff’s alleged disability renders the SSA conclusions on that issue unreliable. Conversely, the court noted that the defendant may suffer real and significant prejudice from the admission of the SSA Disability Determination. The jury may inappropriately give weight, based on the fact that SSA is a government agency, to its conclusions that the plaintiff suffered a disability.