

UNITED STATES DISTRICT COURT
~~EASTERN~~ DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MONROE NEAL,

Plaintiff,

vs.

CASE NO. 95-CV-70991-DT\
HON. LAWRENCE P. ZATKOFF

THE UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 25th day of March, 1996.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court for a decision following a bench trial which took place on March 19 and 20, 1996. Plaintiff brought suit against the United States of America (hereinafter "government") under the Federal Tort Claims Act (hereinafter "FTCA"), 28 U.S.C. §§ 1346 and 2671-2680. Plaintiff seeks non-economic damages resulting from a collision with a United States Postal Service vehicle.

II. BACKGROUND

The collision in question occurred sometime before noon on December 28, 1993 in Detroit, Michigan. Plaintiff was driving his vehicle, a 1979 Cadillac, north on Tillman street. The portion of Tillman at issue is fairly deserted and dead ends at a railway

embankment at the north end. The conditions were clear and dry and there was no other traffic on Tillman at the time.

David Farris, a letter carrier, in the course of his employment with the Postal Service, was delivering mail on his usual route which included the relevant portion of Tillman street. In doing so, he employed a method known as "park and loop" whereby he would park his vehicle and deliver mail to a plurality of houses on foot. It is undisputed that just before the collision, Farris' vehicle was parked on the west side of Tillman facing north. As such, Farris' vehicle occupied a portion of the southbound lane of Tillman while being oriented the opposite direction.

Plaintiff claims to have been traveling at approximately 20-25 miles per hour as he approached the location of the Postal vehicle. Although there is some dispute as to the movement of the Postal vehicle just before the impact, there is no dispute that the vehicle backed up toward the east side of Tillman and struck the driver's side door of plaintiff's Cadillac as it was passing. In backing the vehicle easterly away from the curb, Farris was attempting to turn his vehicle around so as to proceed south on Tillman.

The government contends that the impact was fairly soft, while plaintiff claims there was significant impact. After the collision, plaintiff and a female passenger identified only as Jane exited the Cadillac. Jane soon left the scene on foot. Farris exited his vehicle and spoke briefly with plaintiff. Plaintiff then walked to a public phone and called the police while Farris

called his supervisor, Alois Kahn, from a nearby house. Plaintiff and Farris returned to the scene and were joined by Kahn and a police officer. Plaintiff claimed to be experiencing back pain at the time, but did not request an ambulance. Plaintiff's vehicle exhibited significant damage to the driver's side door, while the Postal vehicle was not damaged. The damage to plaintiff's vehicle was later estimated to be approximately \$1,800.00.

Plaintiff visited Dr. Frederick Lewerenz, D.O., two days after the accident complaining of pain in his neck and back. Dr. Lewerenz determined that plaintiff exhibited a musculoligamentous sprain of the neck and lower back resulting in a "fair to poor" lumbar range of motion. Dr. Lewerenz treated plaintiff with medication for pain, a muscle relaxer, and an injection of Cortizone. Dr. Lewerenz also treated plaintiff with muscle stimulation and hydrotherapy. Finally, Dr. Lewerenz recommended a continuing treatment program consisting of similar therapy three to four times per week. Dr. Lewerenz recommended that plaintiff not return to his job as a security guard.

Plaintiff followed Dr. Lewerenz's recommended treatment on a regular basis through April 18, 1994. On April 23, 1994 plaintiff returned to work. Plaintiff saw Dr. Lewerenz three more times in May, June, and finally, July 7, 1994.

III. LEGAL STANDARDS

The FTCA waives sovereign immunity for certain types of personal injury actions. Specifically, the FTCA makes the United

States government liable only insofar as a private individual under like circumstances. 28 U.S.C. §§ 1346 (a) and 2647. The United States is considered to be liable to the same extent as a private person under the Michigan No-Fault Insurance Act. M.C.L.A. § 500.3101, et seq (hereinafter "No-Fault Act"), Zotos v. United States, 654 F.Supp. 36 (E.D. Mich.1984).

The No-Fault Act abrogated common law tort liability for injuries resulting from motor vehicle accidents. However, under the No-Fault Act, an injured person may bring a motor vehicle tort action to recover non-economic damages, such as pain and suffering, under certain limited circumstances. Such an action is permitted where "the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." M.C.L.A. § 500.3135.

As to whether a plaintiff has suffered an "impairment of body function," the proper focus is not on the injuries themselves, but rather on how the injuries affected a particular body function. DiFranco v. Pickard, 427 Mich. 32, 38-39, 67-70 (1986). As to the seriousness of the impairment, the following factors are to be considered:

- (1) the extent of the impairment;
- (2) the particular body function impaired;
- (3) the length of time the impairment lasted;
- (4) the treatment required to correct the impairment; and
- (5) any other relevant factors.

Id. Whether a plaintiff suffered a serious impairment of body

function is a question for the trier of fact. Johnston v. Thornsby, 163 Mich. App. 161 (1989).

Michigan has adopted a pure comparative negligence system. Thus, any contributing negligence on the part of the plaintiff reduces the total amount of damages to which the plaintiff would otherwise be entitled by the percentage of contribution. Placek v. Sterling Heights, 405 Mich. 368 (1979).

IV. FACTUAL FINDINGS AND ANALYSIS

A. Liability

In the instant case, the negligence of David Farris in the operation of the Postal vehicle is not seriously disputed. His own testimony established that he was illegally parked just prior to the accident. Further, while Farris testified to his caution in backing his vehicle from the curb, he admits that he did not see the plaintiff's vehicle until after the collision. Neither party presented evidence indicating that plaintiff's vehicle was moving in any manner, either by way of speed or location, which would have justified Farris' failure to observe it before the accident. Accordingly, the Court finds that Farris was negligent in the operation of the Postal vehicle, and such negligence was a cause in fact of the collision.

The government argues that plaintiff was in some way negligent in the operation of his vehicle such that his comparative negligence should reduce any award to which he might otherwise be entitled. However, the evidence presented at trial failed to

demonstrate any negligence on plaintiff's part. On cross examination, the plaintiff indicated that his horn and brakes were in working order and there was nothing blocking his view. The government contends that plaintiff should have anticipated a collision and taken measures to avoid it rather than driving into the range of the Postal vehicle's bumper. However, the plaintiff testified that he did not see the truck moving backward before the collision. The Court finds that even if he did see the truck backing up, it was reasonable for the plaintiff to assume that the Postal truck would not back into his lane as he attempted to pass. Accordingly, the Court finds that plaintiff was not negligent, and Michigan's comparative negligence law is inapplicable.

B. The Force of the Impact

The extent of the collision's impact was a matter of dispute at trial. Plaintiff testified that his vehicle had not been in a previous accident and was without damage to the driver's side door prior to the collision. Plaintiff then offered photographs, being Plaintiff's Exhibits 1 through 3, showing the damage which he attributes to the collision. He further testified that an estimate calculated the damage to be worth approximately \$1,800.00.

The government does not dispute that plaintiff's vehicle exhibited substantial damage to the driver's side door. However, the government contends that the damage is not attributable to the collision in question. David Farris testified that he was backing up at an extremely low rate of speed and that the impact did not

feel any stronger than when he backs his truck into the dock at the Postal Service for loading. He and Alois Kahn both testified that the damage did not appear to be at the same level as the bumper of the postal truck. Kahn further testified that there was undisturbed dirt in the damaged area of plaintiff's vehicle. Finally, there is no dispute that the Postal truck was not damaged.

The Court finds that plaintiff's vehicle was damaged in the collision to an extent that would demonstrate a significant impact. First, the Court is without any basis to discredit plaintiff's testimony that his car was not damaged prior to the collision. The Court found plaintiff's testimony to be generally straightforward, non-evasive, and credible. While plaintiff did not recollect certain details and events with perfect clarity, the Court found nothing to indicate a character for untruthfulness.

In addition, the Court gives the opinions of Farris and Kahn relative to the source of the damage very little weight. Neither Farris nor Kahn saw plaintiff's vehicle until after the collision. Their testimony regarding the height of the bumper with respect to the damage was unsubstantiated by any photographs of the postal truck or measurements. Also, neither witness was qualified as an expert in the area of accident reconstruction. As to the testimony concerning the undisturbed dirt, Kahn's observations are contradicted by a photograph taken by her just after the accident, being Defendant's Exhibit 2. A close examination of the photograph reveals that the area just under a partially unattached piece of trim is relatively free of dirt. The photograph thus suggests that

the piece of trim became unattached shortly before the photograph was taken.

Although damage to plaintiff's Cadillac is not recoverable in the instant suit, the extent of the damage is instructive on the force of the collision. The Court finds that the damage substantiates plaintiff's testimony indicating a significant impact.

C. Serious Impairment of Body Function

The extent of plaintiff's injuries is important on the issue of whether plaintiff suffered a serious impairment of body function as well as his damage claim. As to the impairment of a body function, plaintiff claims to have suffered a limitation in his range of movement in his neck and back. His range of movement was described by his treating physician, Dr. Lewerenz, as follows:

Fair to poor meaning that because of the musculoligamentous tightness and because of the muscle spasm the range of motion was not free. It was not easily attainable in all planes or flexions, extension forward, backward bending, side-to-side bending, turning left turning right. There was some limitation because of the tissue tightness.

Patient had musculoligamentous sprain of the paraspinal tissues of the neck and low back.

It simply means during an automobile altercation or accident or injury the patient's structures about the spinal area were stretched beyond the range of acceptable limits creating spasms, sprain, strain as you would do if you sprained your ankle or knee. However, being a much more delicate area -- a much more delicate tissue -- the spinal cord in this sense creates a tightness and resistance causing pain for the patient causing the neck and low back to not be able to function in a normal fashion.

De Bene Esse Deposition of Dr. Lewerenz 8-9 (emphasis supplied). Dr. Lewerenz recommended that plaintiff not return to work and that he limit his physical activities for several weeks. Id., at 10.

Plaintiff returned three to four times each week, upon Dr. Lewerenz's recommendation, for muscle stimulation, hydrotherapy, and medication. Id., at 11. On June 22, 1994, Dr. Lewerenz again treated plaintiff and recommended that he return as needed. Plaintiff's last visit to Dr. Lewerenz was on July 7, 1994. Id., at 13-14.

The government challenged the seriousness of plaintiff's injury, and offered the testimony of Carla Morton, M.D., to dispute the diagnosis of Dr. Lewerenz. Dr. Morton testified that, as of her examination of plaintiff on April 5th, 1994, plaintiff did not have a serious impairment of bodily function. De Bene Esse Deposition of Dr. Morton 60. Dr. Morton's conclusion was based on her opinion that plaintiff exhibited no purely objective indications of an impairment, as well as her opinion that plaintiff was feigning pain in conjunction with certain movements. Dr. Morton attributed plaintiff's limited range of motion to his own volition. In addition, the government offered the testimony of Richard Krugel, M.D., who evaluated plaintiff on August 23, 1995.

The Court notes that all three physicians who testified as to plaintiff's physical condition were in general agreement that the diagnosis of a soft tissue back injury is largely dependant upon subjective input from the patient. Being so, Dr. Morton's opinion that plaintiff did not exhibit a serious impairment on

April 5th, 1994 was based primarily on her evaluation of the genuineness of plaintiff's complaints. In explaining her opinion, Dr. Morton testified that plaintiff's complaints of pain were, in her opinion, exaggerated, and at times inconsistent.

The Court is hesitant to discount Dr. Lewerenz's diagnosis on the basis of Dr. Morton's opinion. First, Dr. Morton was hired by plaintiff's insurance company to evaluate plaintiff. The inherent tendency for such an evaluation to ultimately discount a claimant's subjective complaints cannot be ignored. Also, in contrast to Dr. Lewerenz, Dr. Morton's testimony is based on a single evaluation. Although the Court recognizes that the nature of Dr. Lewerenz's practice lends itself to the production of "favorable" evaluations for plaintiffs, Dr. Lewerenz did treat plaintiff for several months. As a result, Dr. Lewerenz was able to testify as to plaintiff's condition throughout the period between the collision and Dr. Morton's evaluation. Finally, the Court finds that Dr. Lewerenz's diagnosis is consistent with other evidence. Specifically, from the damage to plaintiff's vehicle, one would expect an injury to the driver. Also, plaintiff's diligence in making numerous visits to Dr. Lewerenz's office for treatment suggest that plaintiff was indeed suffering significant discomfort. Finally, the Court's own assessment of plaintiff's credibility is at odds with that expressed through Dr. Morton's testimony. See Part IV-B, supra.

As to Dr. Krugel's testimony, due to his examination being some twenty months after the fact, the Court finds his

testimony to be of little or no assistance in determining plaintiff's condition in the months after the accident. However, the Court notes that Dr. Krugel believed plaintiff was cooperating in his range of motion tests. Thus, Dr. Krugel's testimony only bolsters plaintiff's credibility.

Based upon all of the medical testimony presented at trial, as well as the Court's evaluation of the impact of the collision and plaintiff's credibility, the Court finds that plaintiff suffered a serious impairment of body function as a result of the accident. The Court considers the movement of plaintiff's neck and back to be a body function. From the time of the accident through April 23, 1994, when plaintiff returned to work, plaintiff suffered a limited range of motion in his neck and back. Although plaintiff's back injury was relatively mild and treatable with rather non-invasive methods, the Court's focus is properly on plaintiff's reduced function. An impaired function of the neck and back is a uniquely crippling condition; greatly reducing one's quality of life. As such, the Court considers plaintiff's impairment to be "serious" for the purposes of the No-Fault Act.

D. Damages

Having found plaintiff to have met the requisite threshold under the No-Fault Act, the Court must evaluate plaintiff's damages. In doing so, the Court is limited to consideration of plaintiff's non-economic damages. The Court finds that plaintiff has only shown a serious impairment of bodily

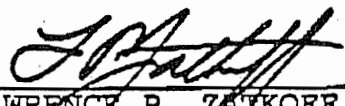
function through the time he returned to work in April. It is the finding of the Court that plaintiff is entitled to damages for his pain and suffering during that period in the total amount of \$7,500.00.

V. CONCLUSION

The Court has found that plaintiff suffered a serious impairment of body function resulting from the negligent operation of the United States Postal Service vehicle driven by David Farris on December 28, 1993. Further, the Court has found that plaintiff was not negligent in a contributing manner in the operation of his vehicle. Finally, the Court has found plaintiff to be entitled to damages to be in the amount of \$7,500.00.

Accordingly, IT IS ORDERED that defendant, The United States of America, submit to plaintiff the amount of \$7,500.00.

LET JUDGMENT BE ENTERED ACCORDINGLY.



LAWRENCE P. ZAYKOFF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MONROE NEAL,

Plaintiff,

vs.

CASE NO. 95-CV-70991-DT
HON. LAWRENCE P. ZATKOFF

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order dated March 25, 1996, judgment is hereby entered for plaintiff, Monroe Neal, in the amount of Seven Thousand Five Hundred Dollars (\$7,500.00) plus any applicable pre-judgment interest.

Dated at Detroit, Michigan, this 25th day of March, 1996.

JOHN P. MAYER
CLERK OF THE COURT

BY:

R. P. Nutter

APPROVED:

L. P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

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❖ EASTERN DISTRICT

❖ CONTINUED FROM PAGE 9A

gaining agreement, and (2) whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law."

Plaintiff's "claim for false arrest under Michigan law is a classic example of a tort claim based upon 'non-negotiable' state law rights independent of rights established between the parties by the CBA.... The right to be free from arrest or imprisonment unsupported by probable cause and the factors defining the scope of this right derive from an independent body of state law, not from the CBA between [defendant-store] and the Union." The false arrest claim is not preempted by the LMRA. Plaintiff's motion to remand this claim to state court is granted.

Other Claims Pre-Empted

The intentional infliction of emotional distress claim implicates the CBA because the issue of whether defendants' conduct was outrageous "depends upon whether the defendants' actions contravened the collective bargaining agreement."

As to the negligent hiring and supervision claim, any duty regarding this claim would arise "solely from the collective bargaining agreement" and would require interpretation of the CBA.

Plaintiff's claim for tortious interference with contractual relations is also pre-empted by the LMRA. Plaintiff claims she had a just-cause employment contract. But any such contract would arise from the CBA and necessarily require interpretation of the CBA.

The respondeat superior claim would require this court to "analyze the relationship between the employer and the alleged employee tortfeasor, which is de-

are subject to a six-month statute of limitations. In this case, the statute began to run the day after the 90-day period the union had under the CBA to seek arbitration of plaintiff's claim. Plaintiff did not sue until almost a year later.

The false imprisonment claim is remanded to state court. The remaining claims are dismissed.

Weatherholt v. Meijer, Inc., et al. (Lawyers Weekly No. 24294 - 17 pages) (Gadola, J.).

Summary by EW.

Negligence

Slip and Fall in Airplane - Insufficient Evidence of Causation

Where plaintiff could not identify any defect in an airplane that caused her to slip and fall in the plane's aisle, the case will be dismissed because plaintiff cannot prove causation.

In her deposition, plaintiff "explains that she was injured when she attempted to move from her aisle seat into the aisle to permit another passenger to walk past her." Plaintiff said that, "I stood up and turned my left and my whole — my body was already in the movement to go into the aisleway and I couldn't move my leg, my foot, and my knee just came apart."

Plaintiff says that after the accident, she discovered a metal carpet strip that was raised on one side.

Two flight attendants on plaintiff's flight said there was no carpet stripping in the area but instead, there was emergency exit strip lighting. Defendant argues that plaintiff has not shown that either the alleged carpet strip or the emergency lights caused plaintiff's fall. Plaintiff, when asked whether she felt her foot

"Because Plaintiff does not state in her deposition that she felt herself trip over something, she essentially admits that she does not know if she tripped over anything at all.... Plaintiff merely assumes that because she observed the carpet strip to be in a raised position after her fall, it must have caused her accident. This speculation is insufficient to establish a genuine issue of material fact regarding causation."

Defendant-airline is granted summary judgment.

Proud v. Northwest Airlines. (Lawyers Weekly No. 24341 - 10 pages) (Friedman, J.).

Summary by EW.

No-Fault

Non-Economic Damages - Government Employee

Where plaintiff suffered serious bodily injury due to a back and neck injury which occurred when his car was hit by a United States Postal Service vehicle, plaintiff is entitled to non-economic damages.

Plaintiff's car was hit by a United States Postal Service vehicle. Plaintiff's car incurred \$1,800 worth of damages. Plaintiff injured his back and neck. He was off work about four months.

Plaintiff sued the United States under the Federal Tort Claims Act (FTCA). A trial was conducted in this matter.

Government Liability

The court finds that the postal carrier illegally operated the postal vehicle. The carrier admitted that he was illegally parked and that he did not see plaintiff's car when he pulled out. Neither party presented evidence that plaintiff's vehicle was travelling at an excessive speed. The government argues that plaintiff should have seen the postal truck pulling out.

No-Fault

Non-Economic Damages - No Serious Impairment

Where plaintiff-passenger was injured when defendant-government's vehicle hit his car, he is not entitled to non-economic damages because he has failed to establish that he suffered a serious impairment of body function.

Plaintiff was a passenger in a vehicle which was hit by a United States Immigration and Naturalization employee. Defendant has conceded the issue of negligence. The only matter before this court is the issue of damages.

Plaintiff complains of pain in his knees. He underwent arthroscopic surgery but claims the pain persists. Plaintiff acknowledges that he had previously injured the left knee in a skiing accident.

Under MCL 500.3135, a person may only recover non-economic damages if the person can show that he suffered a "serious impairment of body function, or permanent serious disfigurement."

The evidence presented indicates that plaintiff has failed to establish that he has suffered a serious impairment of a body function. "Plaintiff did testify that he injured his knees, neck and back as a result of the accident. However, Plaintiff has failed to establish that the injuries affected a particular body function."

Although plaintiff underwent two surgeries, there is "no objective evidence to substantiate Plaintiff's knee, back or neck problems. ...

"As to the issue of whether the impairment was serious, the Court finds that Plaintiff had failed to establish this criteria. ... Plaintiff has also failed to establish that a particular body function was impaired. The medical evidence also does not substantiate the length of time the impairment lasted." Also, the treatment plaintiff received significantly improved his symptoms.

alleged employee...
fined by a collective bargaining agree-
ment." This claim is pre-empted as well.
The claims pre-empted by the LMRA

hit something as she was moving,
plied, "I don't know that I was cognizant
of that. All I know is I started falling....

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The court disagrees. Even if plaintiff should have seen the postal vehicle, "it was reasonable for the plaintiff to assume that the Postal truck would not back into his lane as he attempted to pass. Accordingly, the Court finds that plaintiff was not negligent, and Michigan's comparative negligence law is inapplicable."

The government disputed the force of impact. The government does not argue that plaintiff's car was damaged. The government argues that the damage was not caused in this collision. The court disagrees. Plaintiff's vehicle was damaged to an extent that would demonstrate a significant impact. Also, there is no evidence to discredit plaintiff's testimony that his car was not damaged prior to the collision. Plaintiff's testimony was straightforward, non-evasive and credible. "While plaintiff did not recollect certain details and events with perfect clarity, the Court found nothing to indicate a character for untruthfulness."

Serious Bodily Impairment

As to plaintiff's injuries, there was adequate support for plaintiff's claim that he suffered a limitation in his range of movement in his neck and back. "Based upon all of the medical testimony presented at trial, as well as the Court's evaluation of the impact of the collision and plaintiff's credibility, the Court finds that plaintiff suffered a serious impairment of body function as a result of the accident. The Court considers the movement of plaintiff's neck and back to be a body function. From the time of the accident through April 23, 1994, when plaintiff returned to work, plaintiff suffered a limited range of motion in his neck and back. Although plaintiff's back injury was relatively mild and treatable with rather non-invasive methods, the Court's focus is properly on plaintiff's reduced function. An impaired function of the neck and back is a uniquely crippling condition; greatly reducing one's quality of life. As such, the Court considers plaintiff's impairment to be 'serious' for the purposes of the No-Fault Act."

The court finds that plaintiff is entitled to damages for pain and suffering in the amount of \$7,500.

Neal v. United States. (Lawyers Weekly No. 24346 - 13 pages) (Zatkoff, J.).

Summary by KMP.

plaintiff has not met the threshold requirement under M.C.L.A. sec. 500.3134(1) in order to recover noneconomic damages."

Daris v. United States. (Lawyer Weekly No. 24348 - 11 pages) (Hood, J.).
Summary by MLC

Securities

Failure to Investigate - No Private Cause of Action

Where plaintiff-brokers sued defendant-securities association for failing to review the accuracy of certain forms before filing them, plaintiff's claims are dismissed because there is no private cause of action against defendant for allegedly violating its own rules.

Defendant-National Association of Securities Dealers (NASD) is registered with the Securities and Exchange Commission (SEC) as a national securities association. Defendant is required to establish standards for licensing and regulation of securities professionals. In doing so, it uses two forms: U-4 and U-5.

Background

Plaintiff-brokers are former employees of Prudential Securities, Inc. Prudential was accused of defrauding its investors. Under NASD's rules, "Prudential was required to amend its U-4 and U-5 forms if its registered representative became the subject of a claim of fraud, the wrongful taking of property in excess of ten thousand dollars." Prudential amended these forms for plaintiffs.

Plaintiffs argue that Prudential committed fraud and acts of misrepresentation in connection with its sales of securities in more than seven hundred limited partnerships to investors. They allege that Prudential purposely amended the U-4 and U-5 forms to conceal broker violations, when, in fact, the information should have been reported as company violations. The underlying premise of the Plaintiffs' claims is that the NASD did not comply with its regulations, in that it failed to reinvestigate the accuracy of the information within each report prior to making