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PROCEDURAL HISTORY

Plaintiffs will rely upon the Procedural History set forth in the Legal Brief submitted by Defendant-Appellants.

STATEMENT OF FACTS¹

After a discussion with counsel for all parties concerning the evidence, and review of some of the documents, the trial judge *sua sponte* entered summary judgment as to liability against the defendants on October 7, 2003, right before the beginning of *voir dire*. [1T-10:23 to 14:19] Not only were there no facts in dispute to warrant a trial as to liability, but the defendants were barred from testifying and their defenses were stricken for refusing to appear for their depositions. [1T-17:10-15]

Defendants' appeal pertains mostly to whether the Plaintiff Joshua Piper's (hereinafter referred to as "Mr. Piper") injuries were sufficient to breach the verbal threshold and to justify an award on non-economic damages. Various persons testified as to his injuries, including a chiropractor, Dr. Constantine Fotiou; an orthopedic surgeon, Dr. I Ahmad; and, the two plaintiffs, Mr. and Mrs. Piper.

As stated in defendants' brief, this lawsuit concerns injuries sustained as a result of a motor vehicle accident on May 21, 1999. Db-2. At the time, Mr. Piper was 22 years old

¹ "1T" refers to the trial transcript dated October 7, 2003.

"2T" refers to the trial transcript dated October 8, 2003.

"Db" refers to defendants' brief.

and employed at Lee Myles in Sayreville, New Jersey, where he worked on transmissions. [2T-4:20 to 5:3; 2T-5:16-20] At the time of trial he was still working in the same profession, but at Tech Transmissions in Edison, New Jersey. [2T-4:9-15]

The accident occurred on Smith Street in Perth Amboy, New Jersey. Mr. Piper was sitting in the driver's side seat of his vehicle waiting for his wife to get out of work when it was violently struck by the defendants' vehicle. Mr. Piper's vehicle was struck with such force that it tossed him from the driver's seat to nearly the passenger side floor. The defendants' vehicle then went on, flying out of control, and crashed straight into a store. [2T-7:21 to 9:18; 2T-12:5-18] His car was "totaled". [2T-13:15-16; 2T-99:23 to 100:4]

The pain from Mr. Piper's injuries did not wholly "sink in" for several days later. The accident transpired on a Friday, he was off from work that Saturday and Sunday, on Monday and Tuesday of the following week he was both sore and numb, and by Thursday the pain was so excruciating that he could not sleep. [2T-18:13 to 19:14; 2T-91:19-24]

Mr. Piper's wife, Plaintiff Sharon Piper ("Mrs. Piper"), testified that Mr. Piper first began complaining about his injuries about three days after the accident. [2T-101:16-24] She observed that he was walking hunched over and that he kept complaining that he was in pain. [2T-102:6-16; 2T-103:1-12]

He did not go to a doctor before that because he figured that he was young and that the pain would just go away, he figured that he was only going to be sore for a couple of days, he could not afford to lose time from work, he was not aware that the car insurance would pay for his medical bills and he was scared of an increase in the car insurance premiums that he and his wife could not afford to pay. [2T-20:6 to 21:4] Mrs. Piper also testified that Mr. Piper kept arguing to her that he was not going to the hospital because they did not have insurance to cover it and they could not otherwise afford the expense of it. [2T-102:17-23; 2T-103:21 to 104:1]

The first doctor to examine Mr. Piper was Dr. Fotiou, a chiropractor. [2T-26:8-13] Dr. Fotiou testified that the first time he treated Mr. Piper was on June 1, 1999. [1T-42:18-24]

During the initial interview Dr. Fotiou noted that Mr. Piper was involved in two accidents prior to the one in issue herein, but that no injuries were sustained during those accidents. [1T-43:12-21] Mr. Piper told him that he had never hurt his back before the accident at issue in this case. [1T-45:25 to 46:4] Mr. Piper testified that he had never before the accident in question hurt his neck, lower back or mid back; he had never received medical treatment before the accident for any of those parts of his body; he had never been

hospitalized; he had never been treated by a chiropractor; he had never received physical therapy; and, he has never been a party to a lawsuit. [2T-27:21 to 28:11; 2T-29:11-25]

Dr. Fotiou noticed as soon as Mr. Piper walked through the door that he had gait (i.e. a limitation in the range of motions while walking) and noticeable antalgia (a leaning of the body to one side, usually to shift weight to ease pain). [1T-43:22 to 45:1] The physical examination concluded that Mr. Piper was suffering from a forty-seven percent limitation on the use of his neck with severe inflammation. [1T-46:12 to 47:9] A biochemical analysis with x-rays showed that the first and last of the seven bones in Mr. Piper's neck were out of place. [1T-54:7-18]

Dr. Fotiou testified that the discs being out of place was not something that Mr. Piper could fake. The findings were objective. [1T-54:25 to 55:6; 1T-65:6-8] This serious injury to the neck is permanent in nature, will heal abnormally, alter the function of the joints and cause recurring pain. [1T-93:9 to 94:9]

Moreover, the x-rays showed that the eighth of plaintiff's twelve discs in his spine was "wrenched out of place". [1T-57:3 to 59:4] In order for those discs to be so out of place, Mr. Piper's ligaments had to be torn that were securing the discs in place. [1T-57:3 to 58:7] These

findings of torn ligaments and herniated discs are objective in nature, are shown by the x-rays and cannot be faked by Mr. Piper. [1T-65:9-25]

Mr. Piper's torn ligaments and herniated discs are a permanent injury [1T-58:8-12; 1T-61:23 to 64:22; 1T-95:22 to 96:15] that will cause Mr. Piper pain and discomfort for the rest of his life. [1T-64:23 to 65:5; 1T-77:12-13; 1T-78:8-9] There is nothing that can be done to cure that condition. [1T-16-19] He will suffer more discomfort while standing up, as opposed to lying down, because his weight will naturally put pressure upon the lumbar spine while standing. [1T-88:15 to 89:3; 1T-90:19-22]

This is not to say that sleeping will be comfortable, however. Mr. Piper will be able to lie with his neck in one position for only about thirty minutes before cramping begins due to the "load" upon the ligaments. [1T-90:24 to 91:16] This scenario will apply when Mr. Piper lies down to sleep, as well as when he is lying down under a car lift at his job working on transmissions. [1T-91:17 to 92:12]

Dr. Fotiou testified that physical work such as that which Mr. Piper does for a living will cause his pain to be recurring, especially frequent bending and lifting which may exacerbate the condition altogether. [1T-92:13 to 93:8; 1T-95:4-16] This injury to the lower back will permanently

interfere with Mr. Piper's normal everyday life. [1T-94:10-13] The vertebral discs the Mr. Piper injured are shock absorbers, and now that that has been compromised, any kind of jostling whatsoever (walking, jogging, lifting a 20 pound bag) could cause instant pain inflammation. [1T-96:20 to 98:3]

For therapy for the condition, Mr. Piper was treated a total of 53 times in a three month period in Dr. Fotiou's office. [1T-70:20 to 71:2] Mr. Piper's was discharged from treatment on October 11, 1999. At the end of treatment, he was still thirty-four percent deficient in the range of motion of his neck and thirty-percent deficient in his lower back. [1T-72:2-23]

Dr. Fotiou's conclusions to a reasonable degree of chiropractic medical certainty are set forth at 1T-66:5 to 67:14 and 1T-98:4 to 99:3. The injuries sustained were consistent with that of the accident described to him. [1T-67:11-22; 1T-98:4-10; 1T-102:3-14]

Mr. Piper was also evaluated by Dr. I Ahmad, who is an orthopedic surgeon having thirty (30) years experience in the field. [2T-173:1-3] Dr. Ahmad testified that his objective findings were that Mr. Piper's muscles in his neck and lower back were spastic (i.e., were tight), rigid and hard on palpation. [2T-176:13 to 177:4] He also reviewed MRI films taken by Radiologists Heidi Fine, M.D., and Steven Brownstein,

M.D., and he agreed with the findings of those two doctors.

[2T-178:7 to 179:7]

As a result of Dr. Ahmad's examination, his review of the MRI films and the reports generated by the two said radiologists, Dr. Ahmad concluded to a reasonable degree of medical probability that Mr. Piper suffered a sprain of the neck and the back with radiation of pain and a herniated disc.

[2T-179:8-16] Dr. Ahmad also concluded that the injuries were permanent in nature, would interfere with Mr. Piper's everyday life and were casually related to the accident herein in issue. [2T-179:17-20; 2T-191:14-22; 2T-194:13-18]

Mr. Piper's subjective trial testimony as to his injuries was in accord with Dr. Fotious objective testimony about what Mr. Piper's limitations would be. Mr. Piper testified that every twenty minutes he has to break from leaning over into a vehicle to work on it because it causes his lower back to tighten up and cause him pain. [2T-36:10 to 37:15] Also, he can only work for twenty minutes straight with his hands over his head or with tools because it starts to cause him sharp pain in his neck. He also gets that sharp pain in his neck if he looks to quickly to one way or the other. [2T-36:10 to 37:15] He never had any of these problems before the accident. [2T-37:16 to 38:6]

Mr. Piper also testified that his work responsibilities that used to take him two hours to complete now take him three of more hours. [2T-40:22 to 41:10] He can now only do lifting with limitations and he frequently needs assistance from co-workers. [2T-37:23 to 38:6; 2T-40:11-21] He can no longer toss his daughter around in play, run and jog or sleep through the night without experiencing pain (he now has restless sleep at least three times per week). [2T-38:7-21; 2T-39:10-22; 2T-41:11 to 42:6]

Mr. Piper has to go sleep on the couch most of the time, which causes strains between he and his wife. [2T-41:20-23; 2T-42:10-14] Mrs. Piper testified about Mr. Piper's inability to enjoy a good night sleep for the past four years and that he was never like that before. [2T-115:16-25] Mr. Piper also testified that he never had problems sleeping before the accident. [2T-42:7-9] He takes a generic drug for Flexeril, which is a muscle relaxant, about every three months when the pain is excruciating, and he takes Advil painkillers almost every night. [2T-47:6 to 48:1]

To this day, on a scale of one-to-ten, with ten representing the most severe pain, Mr. Piper testified that on the bad days his pain is an eight and comes in two week spurts. Besides those times, his pain is a four with a great deal of numbness. [2T-49:16 to 50:5] Only sometimes on a

weekend there is no paid when he has nothing physical to do.

[2T-50:6-13]

LEGAL ARGUMENT

THE EVIDENCE PROVIDED BY MR. PIPER WAS SUFFICIENT TO JUSTIFY AN AWARD OF NON-ECONOMIC DAMAGES BECAUSE HE PROVED THAT HIS INJURIES WERE PERMANENT IN NATURE AND HAD SERIOUSLY IMPACTED HIS LIFE

As set forth in the Statement of Facts section of this Legal Brief, Mr. Piper presented at trial two expert witnesses as to the permanency of his injuries: Dr. Constantine Fotiou, a chiropractor, and Dr. I Ahmad, an orthopedic surgeon.

Mr. Piper has suffered, *inter alia*, a herniated disc as a result of the accident in question. This court has recently taken judicial notice of the fact that a herniated disc is a serious soft tissue injury. Serrano vs. Serrano, 367 N.J. Super. 450, 459 (App. Div. 2004).

Both of Mr. Piper's before mentioned expert witnesses concluded that Mr. Piper was seriously injured, the injuries were casually related to the accident in question and that the injuries would significantly impact Mr. Piper's life on a permanent, day-to-day basis. [1T-94:10-13; 1T-96:20 to 98:3; 1T-64:23 to 65:5; 1T-77:12-13; 1T-78:8-9; 1T-58:8-12; 1T-61:23 to 64:22; 1T-95:22 to 96:15; 2T-179:17-20; 2T-191:14-22; 2T-194:13-18]

Besides the experts' testimony about the significant impact, Mr. Piper and his wife testified about the impact of Mr. Piper's injuries upon his life.

Mr. Piper testified that he must break from his work as an auto mechanic every twenty minutes and that he never had that problem before the accident in question. [2T-36:10 to 38:6] His work responsibilities that used to take him two hours to complete now take him three or more hours [2T-40:22 to 41:10], he frequently needs assistance from co-workers [2T-37:23 to 38:6; 2T-40:11-21], he can no longer toss his daughter around in play, run and jog or sleep through the night without experiencing pain (he now has restless sleep at least three times per week). [2T-38:7-21; 2T-39:10-22; 2T-41:11 to 42:6] He must sleep on the couch most of the time, which causes tensions between he and his wife, and he frequently takes drugs to calm him and enable him to sleep. [2T-41:20-23; 2T-42:10-14; 2T-115:16-25; 2T-42:7-9; 2T-47:6 to 48:1]

In addition, on a scale of one-to-ten, with ten representing the most severe pain, Mr. Piper testified that on the bad days his pain is an eight and comes in two week spurts. Besides those times, his pain is a four with a great deal of numbness. [2T-49:16 to 50:5] Only sometimes on a

weekend there is no paid when he has nothing physical to do.

[2T-50:6-13]

The defendants submitted no evidence at trial that Mr. Piper was not so injured. They only submitted testimony from two medical experts who differed in opinion from Mr. Piper's experts, and the jury apparently found Mr. Piper's experts to be more credible.

In this regard, the defendants are asking the court to interfere with that jury finding, whereas this court does not have the benefit of personally observing the credibility of the witnesses as the jury did. It would be "improper for the Appellate Division to engage in an independent assessment of the evidence as if it were the court of first instance." State vs. Locurto, 157 N.J. 463, 471 (1999). The Appellate Division is not free to make its own independent credibility determinations. Id.

Besides the difference in medical opinions, the defendants complain that the surrounding circumstances allegedly show that Mr. Piper was not really injured. As evidence of that they provide that Mr. Piper has vacationed at Busch Gardens with his family and that he went on the rides with his daughter. Db-5. The defendants wrote that in their brief as if Mr. Piper went on violent roller coaster rides, whereas his testimony was only that he went on the little tea

cup ride with his six year old. [2T-81:3-6; 2T-3:25 to 4:5]
That proves nothing.

Other than that, defendants claim that the injuries in question were pre-existing in nature as allegedly evidenced the testimony of one of Mr. Piper's expert witnesses, Dr. Ahmad, that Mr. Piper's spine showed pre-existing degenerative changes. Db-4.

Defendants omit to point-out, however, that Dr. Ahmad also testified that absent any prior symptoms, the injuries sustained in this case were "in all probability aggravated by this accident" and "in all probability this accident caused him to suffer from these injuries". [2T-191:23 to 193:22]

Moreover, based upon the medical history provided, Dr. Ahmad testified that there were no such prior symptoms that indicate by any means that Mr. Piper's injuries were related to the said pre-existing degenerative changes. [2T-195:3-21]
No such symptoms were present until after the accident in question. [2T-195:24 to 196:4]

Finally, the defendants argue that Dr. Ahmad never said that his findings were made within a reasonable degree of medical probability. Db-4. That is also not true. Dr. Ahmad concluded to a reasonable degree of medical probability that Mr. Piper suffered from a sprain of the neck and back with radiation of pain and a herniated disc. [2T-179:8-16]

The defendants' entire appeal is wholly and entirely frivolous. Points I and II of the defendants' brief are essentially the same. Mr. Piper respectfully relies upon this argument in response to both of those points.

CONCLUSION

Mr. Piper has suffered serious personal injuries, including a herniated disc, as a result of the accident in issue. He provided objective expert testimony by two medical professionals as to the permanency of his injuries and the significant impact that those injuries will have upon his day-to-day life. The testimony of Mr. Piper and his wife about the significant impact of the injuries upon his life was consistent with the opinions of his expert witnesses. The jury had no reason to disbelieve him.

The defendants presented no evidence at trial except a differing medical opinion, and a jury, after personally observing all of the witnesses and making their own credibility determinations, believed the testimony of Mr. Piper's experts over that of the defendants' experts.

That was a proper function of the jury, and this Court should respectfully refrain from interfering with it.

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Dated: