

COURT OF APPEALS No. 73926-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ANNE CUTONE,

Appellant/Plaintiff

v.

WAI K. LAW and JANE DOE LAW,
and their marital community,

Respondents/Defendants

APPELLANT'S REPLY BRIEF

FILED
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STATE OF WASHINGTON
2016 APR 25 PM 12:37

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I. REPLY SUMMARY

Respondent implicitly concedes that Anne Cutone had absolutely no symptoms from her 28-year-old clavicle injury prior to this accident. Washington law has long held that evidence of a pre-existing condition is admissible only if there is evidence of recent symptoms. In this case, the trial court grievously erred by admitting testimony of Anne Cutone's clavicle injury without any pre-existing symptoms.

Respondent attempts to conceal this judicial error by essentially changing the subject. Instead of addressing the well-established legal rule that excludes asymptomatic pre-existing conditions, Respondent contends that the only legal analysis necessary to determine this appeal is a relevancy analysis. Respondent insists that Ms. Cutone's 1982 clavicle injury is "relevant" because his hired forensic medical expert, Dr. Richard Kremer, says so. This analysis is circular and would eviscerate 55 years of Washington case law. Further, if this were the law, then every single defendant equipped with a forensic medical expert would simply assert that a plaintiff's pre-existing injury is the source of the plaintiff's current complaint and the pre-existing injury rule would cease to exist as we know it. This is clearly not the state of the law in Washington, nor should it be.

Respondent further contends that this appeal constitutes harmless

error at best. This argument is belied by the last jury question that was asked to Respondent's expert, Dr. Kremer, as follows: "What were the causes of others getting TO, thoracic outlet?" See RP 428; see also Addendum A (Amended Designation of Clerk's Papers, April 22, 2016). Dr. Kremer responded to this question by asserting there "can be a number of congenital abnormalities which can be involved" but emphasized "[t]here's an incidence of broken collarbones that heal properly. Or those that cause a large amount of callous, which can cause the first thoracic outlet syndrome." See RP 429-430. Obviously, the jury was compelled to ask this question of Dr. Kremer, who took full advantage of the opportunity to persuade the jury that the source of Anne Cutone's injury was probably a collarbone injury that she suffered in 1981 or 1982.

Ultimately, the jury decided not to award any compensation to Anne Cutone for any future medical care or future pain and suffering. The only reasonable interpretation of the jury's verdict is that they believed that Anne Cutone was, in fact, injured as a result of the car crash, but over time her injuries were attributable to the only other explanation: a 28 year old collarbone injury.

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II. CLARIFICATION OF FACTS

A. Anne Cutone was Never Previously Diagnosed with TO

Prior to this accident of November 2010, Anne Cutone had never been diagnosed thoracic outlet syndrome. Respondent cannot and did not cite to any fact, document, or opinion to the contrary in his brief. Nevertheless, Respondent plays fast and loose with the record by implying that Ms. Cutone had been previously diagnosed with thoracic outlet syndrome by obliquely referencing that she was “impeached” in trial about her memory with respect to thoracic outlet syndrome. See Respondent’s Brief at p. 6. Respondent’s representation to this Court is inherently misleading, especially since there is absolutely no evidence of any prior diagnosis of thoracic outlet syndrome.

B. Callous Formation

Respondent greatly emphasizes the “callous formation” on Anne Cutone’s clavicle. While it is true that Respondent’s forensic medical expert, Dr. Richard Kremer, discovered this bone calcification during his CR 35 examination of Plaintiff, its significance is completely overblown. Whatever significance Anne Cutone’s callous formation has in this lawsuit is completely undermined by the fact that it was not causing any symptoms whatsoever for the last 28 years before this accident.

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C. Dr. Richard Kremer

In his brief, Respondent repeatedly touts the “board certified” qualifications of Dr. Richard Kremer. While his board certification is accurate, it is equally accurate that Dr. Kremer was reprimanded by the State Medical Board of Ohio in 1993 and suspended from practicing medicine in the State of Ohio for one year. See RP 417-21 Further, while Respondent emphasized Dr. Kremer’s opinion that Anne Cutone’s clavicle injury may be causally related to her current thoracic outlet symptoms, Dr. Kremer’s opinions were never supported by proper evidentiary foundation. This was because Dr. Kremer’s opinions regarding the clavicle injury were never stated on a more probable than not basis as required by Washington law.¹

D. Contrary to Defendant’s Representations, Anne Cutone Complained of Numbness and Tingling at her First Medical Visit Following the 2010 Accident.

Throughout his brief, Respondent repeatedly represented that Anne Cutone had an unusual “delayed onset” of thoracic outlet symptoms. See Respondent’s Brief at p. 16; see also pp. 4, 5, 7, and 21-24. Respondent states that delayed onset symptoms are “unusual if the TOS were proximately caused by a traumatic event.” Id. However, Respondent failed to apprise this Court that Anne Cutone’s medical

¹ While Respondent cleverly cites to Dr. Kremer’s opinions contained in his written report that the clavicle injury may be the cause of Anne Cutone’s thoracic outlet symptoms, Dr. Kremer never provides sufficient foundation for his expert testimony during his trial testimony nor was his report admitted into evidence.

records show that she reported “numbness and tingling” to Dr. Daniel Riegel, M.D., at her first medical appointment nine days after the automobile accident of November 22, 2010. See Ex. 1 at p. 2 (Supplement Designation of Clerk’s Papers on April 22, 2016). Numbness and tingling are symptoms of thoracic outlet syndrome.

III. ARGUMENT

A. Anne Cutone’s Twenty-Eight-Year Old Collarbone Injury was Inadmissible under Black Letter Washington Law.

Defendant relies almost exclusively on a Division III opinion that did not analyze the existing case law on pre-existing injuries. See Torno v. Hayek, 133 Wn. App. 244, 251 (2006). In Torno, there is no discussion or reference of any kind to the wealth of existing case law, such as Harris v. Drake or any of the well-established cases on the admissibility of pre-existing injuries. See e.g., Harris v. Drake, 152 Wn.2d 480, 494, 99 P.3d 782 (2004); Bennett v. Messick, 76 Wn.2d 474, 457 P.2d 609 (1969); Greenwood v. Olympic, Inc., 51 Wn.2d 18, 315 P.2d 295 (1957); Reeder v. Sears, Roebuck & Co., 41 Wn.2d 550, 250 P.2d 518 (1952); Harris v. Drake, 116 Wn. App. 261, 288-89, 5 P.3d 350 (2003). The Torno Court decided the pre-existing issue as if these cases did not exist. Unfortunately, it is impossible to know the reason why the Torno court ignored these cases. Perhaps neither party briefed the court on these cases.

Torno provides very little, if any, guidance to this case, given the robust case law history on this issue, such as Hoskins v. Reich, 142 Wn. App. 557, 566, 174 P.3d 1250, 1254 (2008). In Hoskins, the Court of Appeals reaffirmed the well-established rule that pre-existing injuries are inadmissible without affirmative evidence of reasonably current symptoms. Id. Moreover, Hoskins analyzes and synthesizes the then existing Harris v. Drake line of cases that analyzed this issue in depth. See Harris v. Drake, 116 Wn. App. 261, 288-89, 5 P.3d 350 (2003) and 152 Wn.2d 480, 494, 99 P.3d 782 (2004)

When the facts of this case are applied to the long established jurisprudential principles of Hoskins and Harris, it is clear that the trial court manifestly erred. Respondent fails to offer a single piece of evidence that Anne Cutone had any prior symptoms from her 28-year-old clavicle injury prior to the car accident in this case. This is because no evidence of pre-existing symptoms exists. Anne Cutone simply did not have any problems, whatsoever, stemming from her clavicle injury after injuring it in 1981 or 1982.

Nevertheless, Respondent argues that the calcification on Ms. Cutone's clavicle resulted in a "permanent" injury, but this argument completely misses the point. The issue is not whether the injury is permanent. Rather, the issue is whether the pre-existing injury was symptomatic, or in other words, causing recent medical problems or

treatment. The answer to this question is simply no. Consequently, Washington law deems Anne Cutone's 28 year old clavicle injury to be inadmissible because it would only serve to confuse the jury and prompt speculation. This, of course, is exactly why Respondent fought so hard to admit this evidence at trial.

B. Admitting Plaintiff's Twenty-Eight-Year Old Clavicle Injury Without any Previous Symptoms Cannot Constitute Harmless Error.

Respondent argues that even if the trial court erred it was only harmless error because Anne Cutone's clavicle injury was either cumulative or insignificant. Both of these arguments cannot withstand reasoned analytical scrutiny.

First, Respondent cannot reasonably explain how introducing evidence of Ms. Cutone's clavicle injury is cumulative when Plaintiff's entire argument is that this injury should have been excluded from the jury altogether. The word cumulative is defined as "increasing as each new amount is added or as each new fact or condition is considered." See Cambridge Dictionaries Online. It is logically impossible for evidence to be considered merely cumulative if its original admission was erroneous.

Second, Respondent's argument that admitting Anne Cutone's 28 year old clavicle injury is of only "minor significance" is equally unsustainable. The record clearly shows that Respondent made Anne

Cutone's clavicle injury a central focus of his entire defense at trial. Respondent asked all three of Anne Cutone's testifying physicians about the clavicle injury at trial. Respondent emphasized the clavicle injury in opening, closing and in cross-examination of Ms. Cutone. And finally, Respondent only called one witness in his case in chief, and this was Dr. Richard Kremer. During his direct examination, Dr. Kremer explained that Ms. Cutone's clavicle injury was a possible source of her ongoing thoracic outlet symptoms. And further, after Dr. Kremer was done answering the lawyers' questions, the jury asked him the following question: "What were the causes of others getting TO, thoracic outlet?"

See RP 428. Dr. Kremer responded to the jury's question as follows:

The most common cause of thoracic outlet syndrome is a cervical rib, which is an abnormal rib that comes off above the first rib. In the process of that, there are a number of abnormal strands that go from that rib down to the first rib and the muscles that are present in that area. And therefore, they irritate the nerve, and it's mostly seen with -- with neurogenic thoracic outlet syndrome. The most common cause of -- or the most well-known cause of thoracic outlet syndrome is in a major league baseball player who thromboses his brachial artery and caused himself a stroke and ruined his career (inaudible).

The carpenter that I told you about was the most classic case that I ever saw. And that was because of the constant compression working over his head, between the anterior scalene muscle and the -- and the first rib and the clavicle that the constant trauma caused the vein to clot. And he got a big swollen arm. And it was blue and the clot had to be removed and then the mechanism for the trauma which was the first rib was removed. And as far as I know he did well after those surgeries.

There's an incidence of broken collarbones that heal properly. Or those that cause a large amount of callous, which can cause the first thoracic outlet syndrome. And I'm not sure whether the -- those are related to the -- the clavicle being fractured and not heal and/or have a large callous or the -- the attendant trauma to the neck which would cause fibrosis of the muscles and the tissues in that area. Which would also irritate the nerve, the artery and the vein, they go through there. So there are a number of congenital abnormalities which can be involved as well. Causing more narrowing in those small areas that I mentioned earlier.

See RP 428-30 (emphasis added).

Obviously, the juror who was prompted to ask this question had been influenced by the Respondent's defense strategy of attributing some other cause as the source of Anne Cutone's ongoing thoracic outlet symptoms. And further, Dr. Kremer seized this opportunity to persuade the jury that Anne Cutone's ongoing problems were probably caused by her clavicle injury in 1981 or 1982, rather than the automobile accident of 2010. The only reasonable interpretation of the jury's verdict is that the automobile accident caused Anne Cutone an injury, but her ongoing thoracic outlet problems ultimately were the result of her collarbone injury sustained many years before.

In his brief, Respondent also relies upon two cases to assert that the trial court should be affirmed because the verdict amount was reasonable and appropriate. See Respondent's Brief at 20, citing Wooldridge v. Woolett, 96 Wn.2d 659, 668, 638 P.2d 566 (1981) and

Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). These two cases do not apply in this appellate context because Plaintiff is not appealing on the basis that the verdict amount was too low. Rather, the special verdict is evidence, in and of itself, that the jury clearly attributed Anne Cutone's ongoing thoracic outlet problems to some other medical cause. The only substantive medical cause that was offered as a source of Anne Cutone's ongoing medical problems, other than the automobile accident of 2010, was Plaintiff's clavicle injury. Thus, the jury's decision not to award any future damages to Anne Cutone is an obvious indication that it was persuaded that another source was causing Ms. Cutone's ongoing thoracic outlet problems. When "there is no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983).

IV. CONCLUSION

Washington courts of appeal have repeatedly held that pre-existing injuries are inadmissible unless there is evidence of recent symptomatic behavior. In this case, there is a twenty-eight-year history of silence in regards to Anne Cutone's collarbone injury prior to her 2010 automobile accident. Defendant zealously fought to introduce this information before the jury because Defendant had no other medical explanation for her ongoing symptoms. The record shows that this

evidence probably had a profound effect upon the jury, especially when one juror asked Dr. Richard Kremer about the “other” possible causes of Anne Cutone’s thoracic outlet symptoms. According to Washington law, the only appropriate remedy is to remand this case for a new trial.

Respectfully submitted this 22nd day of April 2016.

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By: _____
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Attorney for Appellant Anne Cutone

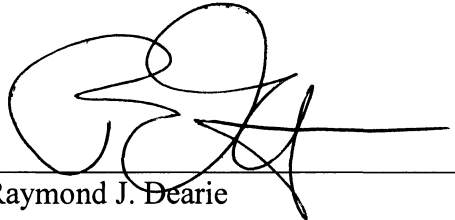
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 22nd day of April 2016 a true and correct copy of the foregoing *Appellant's Reply Brief*, was served upon the following parties and their counsel of record in the manner indicated below:

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Addendum A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

Anne Cutone
Plaintiff
v.
Wai Law, et ano
Defendants

No. 13-2-38259-8 KNT
JUROR QUESTION FOR WITNESS

To: Dr Kremer (witness name)

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Court's Determination: Asked Re-phrased Not Asked

Objection by any party? None Plaintiff Defendant