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Motor Vehicle

Plaintiff claimed car crash caused permanent injuries

Verdict: Defense

Case Type: No-Fault Case, Motor Vehicle - U-Turn, Motor Vehicle - Multiple Vehicle

Case: Michael D. Fulmer & Kelly M. Fulmer v. Daniel D. Powers & Daniel J. Miskey & 84 Lumber, No. 6592/06

Venue: Albany Supreme, NY

Judge: Joseph C. Teresi

Date: 10-17-2008

PLAINTIFF(S)

Attorney:

- Edward P. Ryan; Law Office of Edward P. Ryan; Albany, NY, for Michael D. Fulmer, Kelly M. Fulmer

Expert:

- Darryl DiRisio M.D.; Neurosurgery; Albany, NY called by: Edward Ryan
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- Richard Katz M.D.; Orthopedic Surgery; Albany, NY called by: Edward Ryan
- Manuel Astruc M.D.; Psychiatry; Saratoga Springs, NY called by: Edward Ryan
- Roger Singer D.C.; Chiropractic; Saratoga Springs, NY called by: Edward Ryan

DEFENDANT(S)

Attorney:

- Paul A. Hurley; Boeggeman, George & Corde, PC; Albany, NY, for Daniel D. Powers, Daniel J. Miskey
- Ryan Finn; Bond, Schoeneck & King; Albany, NY, for 84 Lumber

Expert:

- Christopher Calder M.D.; Neurology; Albany, NY called by: Paul Hurley, Ryan Finn
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Insurer:

- MetLife Auto & Home for Miskey and Powers

Facts:

On Oct. 18, 2005, plaintiff Michael Fulmer, 48, a fundraiser for a television network, was driving to

work on the New York State Thruway. As part of his commute, Fulmer exited the highway and stopped for the tollbooth at exit 24 in Albany. After he paid the fare and began to proceed forward, a collision occurred when Fulmer's vehicle struck the side of a vehicle that was attempting to make a U-turn.

Fulmer sued the driver of the turning vehicle, Daniel Powers; the owner of the vehicle, Daniel Miskey; and their employer, 84 Lumber. He alleged that Powers was negligent in the operation of his vehicle while in the course of his employment and that Miskey and 84 Lumber were vicariously liable for Powers' actions.

Fulmer claimed Powers went through the tollbooth in front of him and then attempted to cut in front of his vehicle to make a U-turn. He contended that after going through the toll, Powers turned left and cut across several lanes of traffic. Fulmer claimed that Powers then cut in front of him as he was proceeding through the toll himself and caused the accident. Fulmer's counsel contended that Powers was negligent for attempting a U-turn at a busy toll area.

Powers acknowledged that he went through the toll before Fulmer and attempted to make a U-turn, but he claimed that he was stopped after making a 180-degree turn because of traffic. He contended that as he was stopped, waiting for traffic to clear, the side of his car was struck by Fulmer's vehicle. Defense counsel argued that Fulmer was negligent for the accident by failing to keep a proper lookout and see Powers' vehicle stopped in front of him, and for failing to avoid hitting Powers' vehicle.

Injury:

Fulmer claimed that he sustained a torn supraspinatus tendon of the left shoulder, a bulging disc at C3-4 and injuries to his left knee. He acknowledged that he had a prior cervical fusion at C5-6 and C6-7, but that the collision caused non-union at the surgical sites and resulted in a loss of the normal curvature of the spine at the cervical and lumbar levels. Fulmer also claimed that the accident caused him to suffer post-traumatic stress disorder, anxiety, depression and an erectile dysfunction.

Fulmer claimed that he required surgery to treat the injury to his left shoulder, but that it was canceled because of instability of his cervical spine as a result of the accident. He sought chiropractic treatment for his spinal injuries and claimed that he will need fusion surgery to his spine. He also saw a psychiatrist to address his psychological injuries. At the time of trial, Fulmer was wearing neck and knee braces and required the use of a cane to ambulate.

Plaintiff's orthopedic surgery expert testified to Fulmer's need for surgery on the shoulder tear, but contended that anesthesiology wouldn't clear him as a result of his spinal problems. The plaintiff's neurosurgery expert testified that he had treated Fulmer both before and after the accident. He claimed that Fulmer suffered spondylosis from C3 through C7, with it being worse at C3-4 and C5-6, and non-union at C6-7. He opined that Fulmer was 100-percent disabled as a result of significant pain. The expert further testified that he felt with a reasonable degree of medical certainty that the causal relationship to the motor-vehicle accident was real and that this was accounting for the majority of Fulmer's disability. In addition, the expert opined that Fulmer was 100-percent disabled with relationship to the motor-vehicle accident.

Fulmer claimed that he was unable to return to work as a result of his injuries. He sought recovery of damages for his past and future pain and suffering. Fulmer's wife sought recovery of damages for her loss of consortium.

Defense counsel argued that all of Mr. Fulmer's injuries were preexisting and not causally related to the accident. The defendants' neurology expert testified that MRIs were taken of Fulmer's cervical spine before the accident and again after the crash. He opined that there were no changes in Fulmer's condition as shown in the MRIs. He further opined that Fulmer's pain alleged did not make

anatomical sense. The expert testified that there was no evidence of Fulmer suffering any neurological injury as a result of the accident.

Defense counsel also disputed Fulmer's psychological injuries, including the allegations of erectile dysfunction, and claimed that Fulmer was prescribed Viagra prior to the accident. They argued that every injury Fulmer complained about and was treated for had existed prior to the accident and that the accident did not cause or exacerbate any of Fulmer's alleged injuries. As a result, defense counsel contended that Fulmer did not sustain a serious injury, as defined by the no-fault law, Insurance Law § 5102(d).

Verdict Information The jury rendered a defense verdict. It found that Fulmer did not suffer a significant limitation of use of a body function or system, or a permanent consequential limitation of use of a body organ or member. It also found that Fulmer did not sustain a medically determined, nonpermanent injury or impairment that prevented his performance of substantially all of the material acts that would have constituted the usual and customary daily activities of at least 90 of the 180 days that followed the accident.

Plaintiffs' counsel made a motion in writing to set aside the verdict and enter a judgment in favor of the plaintiffs or order a new trial.

Plaintiffs' counsel argued that the jury's decision was made contrary to the evidence presented by the plaintiffs' four medical experts. However, Judge Joseph Teresi noted that the jury was not required to accept the plaintiffs' experts' evidence, but was required to assess the experts and their testimony. He determined that the jury used a "valid line of reasoning" in its decision to discount the validity of the expert presented by the plaintiffs' experts and that the jury's verdict was supported by a fair interpretation of the evidence. Thus, the plaintiffs' counsel's motion was denied.

Plaintiff's counsel reported that a notice of appeal will be filed.

Editor's Comments This report is based on information that was provided by plaintiffs' and defense counsel.