

Larson v. State Farm Mutual Auto Ins. (bench judgment)

DISTRICT COURT

BENCH JUDGMENT: Claim for \$10,000 additional med-pay above \$61,291 paid including for 93 chiropractic visits with Plaintiff's husband rejected, treating physicians' causation testimony based mostly on Plaintiff's inaccurate symptom history, missing pre-MVA chiropractic record presumed adverse . . . MVA not a substantial factor in wrist/neck conditions . . . insurer paid \$50,000 on behalf of tortfeasor and \$100,000 UIM . . . because neck injury/surgery did not exceed \$150,000, not necessary to resolve dispute as to med-pay, no further amount due under UIM . . . insurer entitled to \$3,200 overpayment . . . Todd.

Sharmon Larson, then 44, was in an MVA 10/25/00 in which her airbag did not deploy and there were no cuts, bleeding, or bruises as she impacted nothing. She felt some tension in her shoulders and some neck pain afterward, but cannot remember the "details." She did not seek immediate treatment with any provider including her husband, Robert Larson, who picked her up within blocks of his chiropractic office. The next day she traveled to Phoenix to visit her daughter. She testified in her deposition that she could not recall what she did in the 7 days after the accident, but at trial testified that she remembered using ice for pain. Her first treatment was 10/31/00 when she saw Dr. Larson, who stated that she was sleeping only an hour or so at a time. She saw him each day and on 11/3 he stated that she was still "in crisis." On 11/3 she saw neurologist Lowell Quenemoen, who noted that she had used no medications, heat, or massage and that the accident had "significantly" affected her golf swing. She testified that "I think I might have tried to swing a golf club, but I don't know that I played." She later claimed to have swung the club once. On 5/31/11 she consented to an IME requested by the at-fault driver's lawyer Martha Sheehy. Larson reported to neurologist Patrick Cahill that "her golfing does not exacerbate any of her symptoms" and admitted in her deposition that this was accurate. She testified at one point that her golf swing was impaired after her surgery. Quenemoen said in his report that her "sleep has not been interrupted" and she was in no marked distress. Larson contended that her sleep was interrupted but also agrees that the report to Quenemoen was accurate. Her neck exam showed mild discomfort. Quenemoen noted that she had preexisting degenerative changes to her cervical spine, but was told by her that she never had neck pain or treatment before the accident. State Farm's exhibit shows that she reported her chief complaint 11/3/00 as "headache and neck pain," complaints which from her records and testimony she had before the MVA. Quenemoen diagnosed cervical strain.

Quenemoen diagnosed carpal tunnel in 12/01. Larson admitted that she did not complain of increasing CT symptoms to him until after she began wallpaper-plastering work in 4/04. The pathology noted a degenerative change in her cervical spine which predated the MVA. People with degenerative changes can slowly begin to experience neck pain.

Dr. Larson testified that he treated Larson because after they discussed the issue of acting as treating provider while married, she insisted that he do so. She testified that she was open to a different provider because of their relationship, and that Dr. Larson stated it would be fine. Larson testified that she could not stand at her son's cross country meets at the same time she was able to work out 2 hours/day, nearly 7 days/wk, at 24 Hour Fitness. She testified that her life was totally shut down after the MVA until 3/01. This was at the same time she sustained a knee injury from her gym exercises. She seeks an award for massage therapy when those appointments occurred at the same time she was working out 2 hrs/day. She admitted in her deposition that she had reported this to Cahill, but testified at trial that the information in the 2001 IME report was wrong and that her deposition testimony was wrong. She admitted working out at the gym 1-2 hours/day in 2001. Cahill's report states that "she works out one to two hours a day every day but that would include also some golfing." She told him that she felt her symptoms were improving in 5/01 and she was extremely active with an exercise program that year. She worsened significantly later to where she reported severe neck pain to Lashman Soriya in 2/02.

Larson's causation case is supported by Drs. Larson, Quenemoen, and Soriya. Soriya did not see her until 1/17/02 and related his treatment to the MVA only by "deductive reasoning" and under the assumption that "all the symptoms began after her motor vehicle injury." He had no information about an 8-month period following the MVA and assumed that her symptoms were stable or not that bad for that period. Her condition worsened in 2/02, and he did not know that she had received 93 chiropractic treatments during this same period and he was not informed of the extent of her abilities for daily exercise during this time. He was not informed of her prior neck treatment until the day of his deposition. The pathologies identified in Larson's MRI can occur absent trauma. To relate disk disease to a particular event, both a pre-accident and post-accident MRI would be necessary. Larson did not have this data. Bilateral CT commonly occurs from repetitive micro trauma, according to Soriya. It can be a progressive disease that is more common in women. Biometric engineers are more qualified to discuss the probability of symmetrical injury. Soriya assumed the CTS set in days or weeks later. He did not recommend any future medical care after 2008.

Larson underwent an anterior discectomy fusion in 2002. She began a wallpaper/plastering business in 4/04. She underwent CT surgery on the right wrist in 8/08. Her right wrist is now good.

Larson told Quenemoen she had no symptoms and no treatment before the MVA. These conditional opinions rendered her pre-accident neck symptom history relevant.

Larson became a patient with her husband in 1984 and had "neck and back adjustments as needed" until their divorce in early 2002. She also worked for him in his office 1988-02. She initially testified in her deposition that she never once had neck pain before the MVA. In her deposition she did not agree to any neck pain or treatment until presented with Don Sommerfeld's letter (listing all providers she had seen during the 10 years prior to the MVA including Dr. Larson 1984-01 for "lower back and neck; adjustments as needed"), at which point she agreed the letter was accurate and she had received treatment for neck pain. At trial, she attributed the difference in testimony to unclear questions. She admits that Quenemoen and Soriya never knew of her prior neck pain or treatment when she saw them. Dr. Larson did treat her when they "started going together." He stated, "when we started dating, there was no paper trail as far as when I'd work on her. It was kind of like a girlfriend-boyfriend type of thing." Larson acknowledges treating with Dr. Larson when they began dating and when she needed relief from pain, but it was not "well care" treatment. Dr. Larson cannot recall any detail of treatment. At trial, Larson contended that the neck treatment occurred only for a headache.

The records of the neck treatment generated 1984-2000 are not available. Larson does not have them and has never seen them since the MVA. Larson admits that Sommerfeld does not have them. Dr. Larson testified that he provided a full set of the records to Sommerfeld and State Farm in 2001. He wrote a letter in 2006 stating that they are "not available or have been thrown away when I sold my practice." He testified that he did not generate a paper record of his treatment of Larson before the MVA. Larson testified that there was a paper record of her chart, and she saw it every time from the beginning of her treatment in 1984, and when she left in 2002 it was fully intact. Dr. Larson agreed that she was accurate about her chart. He stated that chiropractor Jeffrey Mitchell said he had thrown all of Dr. Larson's patient records away. Dr. Larson wrote a 2nd letter stating that his records were given to Mitchell. Mitchell testified that he preserved all of Larson's records and only purged them when they were 7 years old. When Mitchell's office began purging records in 2002, with the records subpoenaed in 2010, Dr. Larson's file should only have had records back to 2002-03, but the chiropractic records begin intact on the first date of Larson's treatment following the 10/25/00 MVA. The records from 2000-02 are all present in Exh.5. Mitchell also stated that it is unlikely his office would have told Dr. Larson they had thrown away all his records. Although Larson had been a patient for 16 years, Dr. Larson had her fill out a "welcome form" 10/31/00 on which she stated that she had never had neck pain before, it was her first episode, and she "felt great and had no problems before the accident!" Dr. Larson's records after the MVA state that 10/25/00 was her "first episode" of neck pain. As to whether this was accurate, he stated, "I don't know." He said his patients can write down whatever they want. Despite having written 2 letters about his chart file on Larson, as well as testifying about his files at length in his deposition in 1/11, he admitted on redirect that he was for the first time stating that he maintained 2 separate chart files on her, explaining that it was the "first time I've ever been asked."

Larson claims medical specials of \$70,474.87. State Farm paid \$61,290.80, including 93 chiropractic visits with Dr. Larson. It did not pay for the videofluoroscopy (which Dr. Larson has stated can increase the size of a verdict), and Dr. Fellows found the video not clinically indicated.

Larson originally testified "yes and no" to whether she had a wage loss claim, but submitted no wage loss claim to State Farm. She testified in 2010 that she planned to stay at Brewer Dental for the foreseeable future, but testified at trial that she wants to return to wallpaper/plastering. She earns \$16/hr working 36-37 hours/wk at Brewer. Because she is making similar money now, she made no claim for future wage loss.

Larson admitted at trial that her prior testimony was that Sommerfeld's letter was accurate. However, she testified that her treatment 1984-01 was solely for headaches. This is not credible in that it is impossible to reconcile her prior statements and Sommerfeld's letter. In addition, her lawyer would not have questioned Soriya 7/11/11 about back and neck pain had her testimony consistently been only for treatment of headaches. Like her claim that she only swung her golf club once at her house after 10/25/00, the Court finds the pre-accident headache treatment to be a statement at trial inconsistent with the extensive contrary evidence.

John Jurist testified that the upper limit speed of the crash (assuming no road friction) was 4.1 mph change in speed. On wet pavement the change would be more like 3.5-3 mph. There is minimal potential for injury at that level of change. The forces in this MVA were less than the MHP's "seatbelt convincer," a sled device that brings the user to a stop from 5 mph. The forces were insufficient to cause a change to Larson's cervical spine. Jurist opined that it is extremely unlikely for the forces to have injured the structures of her wrist. The oblique and rotational nature of the MVA is also unlikely to have caused bilateral wrist injury to the normative person. It is unlikely that the forces would be a substantial factor in bringing about a medical history like Larson's to the normative person.

Based on a review of her history, neurologist Dale Peterson opined that she suffered DDD before the MVA, an opinion noted in Quenemoen's testimony. DDD can frequently occur absent trauma, according to Peterson. Her MRI showed spinal stenosis, which would take a significant force to cause, according to Peterson. He testified that she had a disk herniation, which can occur absent trauma, and a patient would likely report immediate symptoms if an MVA produced herniation. He noted that her history showed she was improving in 2000 and early 2001, but experienced a pronounced turn for the worse at the end of 2001 and early 2002. He noted that she had nearly 100 chiropractic visits in the year after the accident, and he would not have recommended chiropractic adjustment of the cervical spine. He opined that the MVA was a factor in bringing about her neck condition, but not a substantial factor, and that it was not a factor in bringing about the CTS.

Nicholas Mansuetta, whose sub-specialty is hand surgery, said the most common presentation of CT is not from trauma, but from an idiopathic disease process, and that it most commonly occurs in middle-aged women and is different from acute CT and therefore it would be important for the doctor to understand the symptom history. The details of the minor nature of the MVA were very important to him. The fact that Larson reported CT symptoms bilaterally definitely suggests that her CT is from the natural disease process. It is found more commonly in those with repetitive activities with their hand, which explains why her symptoms became pronounced when she undertook wallpaper/plastering in 2004. He opined that the MVA was not a substantial factor in bringing about her CTS, it is not related to the MVA, and the medical bills she incurred for her wrists are not related to it.

The treating physicians' endorsement of a causal relation of their treatment to the MVA is almost exclusively based on Larson's inaccurate symptom history. In that respect, her causation evidence is weak. Peterson's and Mansuetta's opinions enjoy at least as much weight, since they thoroughly reviewed details of the MVA and the entire history and course of treatment.

The MVA was not a substantial factor in bringing about the bilateral CT condition. The Court does not find the medical changes or any general damages associated with this condition related to the MVA. The condition is substantially related to bilateral disease pathology developing over time and significantly increased in symptomatology by Larson's wallpaper/plaster business.

The MVA was not a substantial factor in bringing about Larson's neck condition and ACDF surgery. State Farm made \$3,200 overpayment for medicals under its policy. Larson, through her provider and attorney, appropriated the money to herself and has refused to return it.

There is a disputable presumption that "evidence willfully suppressed would be adverse if produced" and "more satisfactory evidence would be offered if weaker and less satisfactory evidence is offered and it is within the power of a party to offer more satisfactory evidence." § 26-1-602(6). Larson's chiropractic record of treatment to her neck 1984-00 would have been adverse to her case if it had been produced.

The Court must determine the reasonable damages which Larson would be entitled to collect from the at-fault driver and award that value under the insurance policy. However, the Court is entitled to conduct its work in light of the amounts previously paid by State Farm. State Farm has paid Larson \$50,000 on behalf of its at-fault driver and \$100,000 under its UIM policy with Larson, and Larson does not dispute that her claim must exceed this amount to further cover under her insurance contract. Her neck injury and surgery claim does not rise to the level of an injury exceeding \$150,000 for the reasonable compensation due. It is unnecessary to resolve the dispute as to the effect of the \$61,561.80 med-pay. There is no further amount due under the UIM coverage. Larson and Dr. Larson admit that State Farm overpaid medicals in the amount of \$3,200, and judgment is awarded to State Farm for that amount.

Plaintiff's experts: neurologist Lashman Soriya, Billings; neurologist Lowell Quenemoen, Billings (deposed); chiropractor Robert Larson, Billings (live and deposed).

Defendant's experts: neurologist Dale Peterson, Billings (deposed); orthopedist Nicholas Mansuetta, Ronan (deposed); biophysicist John Jurist, Billings.

Demand, \$10,000; offer, \$5,000. Trial request, \$122,654.87; trial suggestion, 0 above what already paid. Lisa Speare, mediator.

Larson v. State Farm Mutual Auto Ins., Yellowstone DV 08-1499, 2/28/12.

Stephen Mackey (Towe, Ball, Enright, Mackey & Sommerfeld), Billings, for Larson; Randall Nelson (Nelson & Dahle), Billings, for State Farm.