STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 315-5-18 Wncv
Osmo Mahmutovic, Plaintiff v. Salvation Army, Defendant	

Opinion and Order on Defendant's Motion for Summary Judgment

Defendant has moved for summary judgment in this negligence action. It submitted a statement of undisputed facts in support of the motion. Defendant asserts that Plaintiff is required to produce expert testimony to support his claim for causation and damages stemming from the alleged incident in this matter. Plaintiff counters that the immediate effects of the incident do not require such evidence and that his testimony should be sufficient to establish causation and damages to that limited extent. The Court makes the following determinations.

Background and Undisputed Facts

The case arises out of an incident that occurred on June 2, 2015 (June 2). Plaintiff was in a parking lot, walking near a truck operated by an agent of the Defendant. At some point, Plaintiff alleges that the truck moved in his direction. In order to avoid being hit, Plaintiff moved quickly aside. He was not struck. Plaintiff's complaint claimed that he received a right hip injury from the quick

avoidance movement. He originally claimed that he suffered long-term injury and permanent pain in his hip.

Defendant's statement of undisputed facts describes that Plaintiff has had numerous prior injuries to his hip. In 2012, he fell at work and had pain in his right hip from 2012 to 2015. He mentioned hip pain to doctors throughout that period. He sought workers compensation and disability benefits due, in part, to the right hip pain. He had arthritis in and cartilage damage to his right hip prior to June 2. Plaintiff received multiple cortisone injections prior to the June 2 incident and multiple ones thereafter.

Plaintiff's memorandum concedes that he may not recover for his claimed long-term/permanent injuries without expert testimony as to causation and damages. He maintains, however, that he should be able to recover for pain and suffering felt for some undetermined period after the incident and that expert testimony is not required to support that claim. He submits his own statement of "undisputed facts" in support of his position.

Analysis

Defendant accurately sets out the Vermont law that typically requires plaintiffs to provide expert testimony as to establish proximate causation and damages in negligence actions. *See* Defendant's Motion for Summary Judgment, at 8–9 & 13; Defendant's Reply Memorandum, at 4–5. The Court need not repeat those citations here.

Defendant counters by relying on *Merrill v. Univ. of Vermont*, 133 Vt. 101 (1974) for the proposition that:

> "There are many cases where the facts proved are such that any layman of average intelligence would know, from his own knowledge and experience, that the injuries were the cause of death. In such a case the requirements of law are met without expert testimony. . . . But where, as here, the physical processes terminating in death are obscure and abstruse, and concerning which a layman can have no well-founded knowledge and can do no more than indulge in mere speculation, there is no proper foundation for a finding by the trier without expert medical testimony."

Id. at 104 (quoting *Burton v. Holden & Martin*, 112 Vt. 17, 19 (1941)). He asserts that his prior injuries had largely subsided at the time of the June incident, that the avoidance movement caused pain, that he sought treatment for it at the emergency room and subsequently, and that such pain and suffering is within the common knowledge of the jury to determine. He concedes that he cannot establish his claim for long-term injury but asserts that the increased pain (for some period) is adequately supported by the record.

The Court concludes that *Merrill* does not preclude entry of summary judgment in favor of Defendant. *Merrill* involved a circumstance different from that presented here. In that workers compensation case, there was agreement as to one mode of injury and one resulting harm that was disabling to claimant for a period of time. The employer then sought to show that claimant was no longer suffering from those same injuries. As a result, *defendant* bore the burden of showing that the effects of the earlier disabling injury had dissipated. Here, there is no agreement as to the source or content of any initial injury; and Plaintiff bears the burden of proof

to establish his claim with regard to the original injury, causation, and to any effects.

The Court does not quibble, however, with Plaintiff's general point that there are circumstances where expert testimony may not be needed to establish causation and damages in a negligence action. *Merrill* notes that as to Vermont law and, indeed, that is the rule elsewhere. For example, in Connecticut, expert testimony is not required where the medical condition is "obvious or common in everyday life" or where "the plaintiff's evidence creates a probability so strong that a jury can form a reasonable belief without the aid of any expert opinion." *Palmer v. Sena*, 474 F. Supp. 2d 347, 350 (D. Conn. 2007) (quoting *Aspiazu v. Orgera*, 535 A.2d 338, 342 (Conn. 1987)). *See Crystal Coca-Cola Bottling Co. v. Cathey*, 317 P.2d 1094, 1100 (Ariz. 1957) (jury "does not require the aid of expert medical evidence in order to determine that the discovery of a fly in a mouthful of coca-cola caused the vomiting which immediately followed the discovery").

For lay testimony as to causation and damages to be sufficient:

> the evidence must be of such a character that the jury can find that there is a reasonable certainty or a reasonable probability that the apprehended future consequences will ensue from the original injury. Consequences which are contingent, speculative, or merely possible are not entitled to consideration in ascertaining the damages.

Howley v. Kantor, 105 Vt. 128, 133 (1933).

Plaintiff's claim founders on the shoals of that standard. The summary judgment record shows that, at the time of the June 2 incident, Plaintiff:

—had suffered right hip pain at various levels since a work-related fall in 2012;

—between 2012 and 2015 Plaintiff's medical records reflect ongoing right hip pain and multiple medical visits concerning that pain;

—Plaintiff sought workers compensation and total social security disability designation based, in part, on the right hip pain;

—Plaintiff received five or six cortisone shots in his right hip before June 2 and more thereafter;

—Plaintiff had arthritis and cartilage damage to his right hip prior to June 2; and

—While the cortisone shots had lessened his right hip pain as of June 2, the pain was still present.

On those undisputed facts, Plaintiff cannot establish causation and damages without expert testimony. This is not a simple case of a healthy person being struck in the leg by a car and seeking damages for the resulting broken leg. The condition of Plaintiff's right hip as of June 2 was certainly "obscure and abstruse." *Merrill*, 133 Vt. at 104. The Court concludes that it is not within the ken of a common person to be able to divine whether any claimed pain from the June 2 incident was due to Plaintiff's attempt to avoid Defendant's truck as opposed to his pre-existing conditions

As Defendant rightly points out, for example, it may be that Plaintiff's most recent cortisone shot had just worn off at the time of the incident. As a result, a jury would be left to speculate as to whether Defendant's conduct caused an independent injury, exacerbated Plaintiff's many underlying injuries, or did nothing at all. *Cf. Lorrain v. Ryan*, 160 Vt. 202, 208 (1993) (expert testimony integral to a

jury determination that a subsequent injury produced a "temporary increase in symptoms"); *see Williams v. Patterson*, 681 A.2d 1147, 1150 (D.C. Ct. App. 1996) ("[I]n cases presenting medically complicated questions due to multiple and/or preexisting causes, . . . we have held that expert testimony is required on the issue of causation.").

Under *Merrill* and *Howley* and the above precedents, expert opinion is required in this case—even with regard to Plaintiff's claim for short-term injury.[1]

Conclusion

In light of the foregoing, Defendant's motion for summary judgment is granted.

Dated this __ day of January, 2020, at Montpelier, Vermont.

_____
Timothy B. Tomasi
Superior Court Judge

[1] In addition, given Plaintiff's post-June 2 doctor visits, injections, and claims of ongoing right hip pain up to the present day, the Court can see no principled cutoff point for such purported "short-term" harm.