

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

04-539

AUDREY BEVERLY, ET AL.

VERSUS

JOSEPH GUIDRY, ET AL.

THIBODEAUX, C.J., concurring in part and dissenting in part.

I concur in the majority's decision to affirm the trial court's judgment on the issue of whether an accident occurred. I disagree with the failure of the trial court and the majority to find a causal connection between the claimed injuries and the accident.

The trial court's finding "that the contact was so minimal that plaintiff did not sustain any injury" is incorrect as a matter of law. This legal error impacted its factual finding that no injury occurred and requires a *de novo* review. The law in the third circuit is clear that the degree of injury is not necessarily proportionate to the force of the impact. The trial court's observation contravenes the holding in *Desselle v. LaFleur*, 03-562, p. 6 (La.App. 3 Cir. 2/4/04), 865 So.2d 954, 958 (quoting *Seegers v. State Farm Mutual Auto Ins. Co.*, 188 So.2d 166, 167 (La.App. 2 Cir. 1966)) where we stated:

It is strenuously urged that the force of impact was so slight it could not have caused the injuries of the nature and extent complained of by the plaintiff, Mrs. Seegers. This argument, in part, is based upon the evidence in the record to the effect that the only damage to the rear of the Seegers automobile was the breaking of the tailpipe bracket

and a small dent in the rear bumper requiring a cost of repair of only \$8.88. While it is indisputably true that the impact was slight, we think it would be a dangerous precedent to attempt to measure the degree of injuries in direct proportion to the force of a collision. The testimony of both the medical experts and the lay witnesses established the fact that Mrs. Seegers did sustain some injuries and the minimal force the collision is, therefore, of no material importance.

Furthermore, the trial court was clearly wrong in its finding that “[t]he plaintiffs’ doctor’s [sic] opinion that the accident caused their injuries are based upon the reports by the plaintiffs that the impact was more significant than I find actually occurred.” That is *not* what the doctors’ analyses were based upon. Rather, the physicians’ conclusions were based upon uncontroverted medical examinations and diagnoses.

In this case, *every* doctor testified that the injuries for which they treated Ms. Beverly were more probable than not related to the January 28, 2002 automobile accident. Dr. Karrie Kilgore testified that Ms. Beverly’s previous symptoms could have been aggravated and she was newly diagnosed with cervical strain:

Q. It was your medical opinion on the date that you diagnosed her with a cervical strain that she did have cervical strain, correct?

A. Yes.

Q. And isn’t it true that you prescribed her medication and physical therapy?

A. Not on the first visit. On the first visit I prescribed medication and moist heat and return in two weeks.

Q. Okay. How about the second visit?

A. The second visit was six days later. She was prescribed a different anti-inflammatory, and x-ray of her neck, and physical therapy.

Q. With everything that I’ve discussed and the medical records in front of you, do you believe more probable than

not that the accident of January 28th, 2002 either caused or at least aggravated any condition she had, meaning any symptoms you treated for on those dates, January 30th, 2002, and February 5th, 2002?

A. I agree that it probably aggravated some of her previous existing symptoms.

Q. However, you just testified earlier that she didn't have any previous—you had never diagnosed her with cervical strain, correct?

A. Correct.

Q. Especially localized on the left and going up to the head?

A. Correct.

Testimony from Dr. Barczyk revealed a similar conclusion:

Q. Dr. Barczyk, given the information you gathered from Ms. Beverly, along with your physical examination, as well as the diagnostic testing, with your experience in low-impact crashes, as well as treating the spine, can you tell this Court that your medical opinion is more probable than not that the symptoms you treated Ms. Beverly for were related to the automobile accident of January 28th, 2002.

A. Yes, that is my opinion.

Q. Dr. Barczyk, if Audrey Beverly's previous medical records from her treating physician, Dr. Kilgore, indicated that on August 6th of 2001, she had complaints of left shoulder pain with no history of trauma; that the doctor prescribed anti-inflammatories, and approximately two weeks later Dr. Kilgore indicated in her medical records that the muscular pain had resolved, that wouldn't alter your opinion, would it?

A. No, it wouldn't.

In October 2002, after seeing several other doctors, Ms. Beverly saw Dr. Appley with continued complaints of neck pain and tenderness. After an MRI scan, his proposed treatment included trigger spot injections over a period of time into her spine and neck area for pain management. Dr. Appley testified that he believed that Ms. Beverly's condition was a result of the January 28th, 2002 accident:

Q. [T]aking everything into account with your examination, the medical evidence you have reviewed, the history you have reviewed, is it still your medical opinion that the symptoms that you treated Ms. Beverly for were more probably than not related to the automobile accident of January 28th, 2002?

A. I think the symptoms that I treated her for and especially the symptoms in the upper part of the neck were—and again, given the fact that her complaints proximally related to the injury resulted from—at least resulted from or were aggravated by the motor vehicle accident.

The record reflects that the medical evidence and testimony were uncontradicted and established a causal connection between the accident and injuries sustained by Ms. Beverly and Mr. Garrick. The trial judge was manifestly erroneous when he reasoned that the doctors' opinions were based upon reports by the plaintiffs that the impact was more significant than the trial judge found actually occurred. The majority compounds this error by affirming his judgment.

The majority observes correctly that “[t]he plaintiff bears the burden of proving, by a preponderance of the evidence, a causal connection between the accident and subsequent injury, *which is generally accomplished through medical testimony.*” While acknowledging this to be the law, the majority inexplicably, and wrongly, concludes that “we find it would be an erroneous ‘precedent’ to suggest that anytime a vehicle makes a contact with another vehicle, however slight, a plaintiff is automatically entitled to damages because she is able to provide *medical* testimony that the ‘accident’ was the cause of or aggravated her injuries.” (Emphasis supplied). If medical testimony is insufficient or inadequate, what other evidence should there be? That is exactly what the law is. The majority recognizes it, repeats it in its opinion, and yet refuses to apply it.

Another glaring misstatement of the law is the majority's suggestion that medically-corroborated subjective complaints can never be the basis of recovery absent objective signs of injury. This bold and incorrect assertion of law is unsupported by any codal, statutory, or jurisprudential authority. In this case, all of the plaintiffs' subjective complaints were buttressed by the opinions of *every* physician and health care provider. The majority suggests that recovery for a subjective injury can occur only if the injury manifests itself in an objective way. By extension, the majority, I suppose, would completely vitiate any recovery in cases where objective signs of an injury may be absent, such as valid psychological injuries and for conditions such as, for example, traumatic neurosis. That suggestion is untenable and inconsistent with Louisiana law.

For the foregoing reasons, I respectfully dissent.