[Cite as *Kuss v. Ohio Dept. of Transp.*, 2003-Ohio-4015.]

IN THE COURT OF CLAIMS OF OHIO

ROSEANN J. KUSS	:	
Plaintiff	:	CASE NO. 99-10143
v.	:	DECISION
OHIO DEPT. OF TRANSPORTATION	:	Judge Fred J. Shoemaker
Defendant	:	

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{¶1} This action is before the court for determination on the issue of damages. Defendant was previously found liable for negligence and judgment was entered in favor of plaintiff with a 50 percent reduction assessed in accordance with R.C. 2315.19, Ohio's comparative negligence statute.

{¶2} A preliminary question is whether to admit into evidence defendant's discovery deposition of Mujeeb Ranginwala, M.D., plaintiff's attending physician. The question was raised at the close of the damages trial and the court deferred ruling until the parties had submitted post-trial memoranda on the issue. Additionally, defendant's counsel filed a reply to plaintiff's memorandum and a motion for leave to file the same. Plaintiff's counsel thereafter filed a reply to defendant's reply. For good cause shown, both parties are GRANTED leave to reply, and the proffered replies are deemed filed instanter.

{¶3} The discovery deposition at issue was taken immediately prior to the taking of Dr. Ranginwala's trial deposition. Both parties were present during the taking of the discovery deposition

and it was filed by defendant's counsel one day prior to the damages trial. Plaintiff's counsel objects to the offer of defendant's discovery deposition because defendant's counsel did not at any time reveal that she would attempt to use it as a trial deposition, or more specifically, as her portion of the parties' trial deposition. Counsel's argument is that had he known that the discovery deposition would be offered, he would have cross-examined Dr. Ranginwala more thoroughly and raised more objections to defense counsel's questions during the discovery deposition. Defendant's counsel has countered that the civil rules do not differentiate between a "trial" or "discovery" deposition nor do they, or any known Ohio case law, impose a duty upon counsel to disclose what type of deposition is being conducted. Further, defendant maintains that it would have been a "needless consumption of time" to repeat all of her questions in the subsequent trial deposition.

{¶4} Upon review of the memoranda, replies, and arguments of counsel the court concludes that plaintiff's objections to the admission of the discovery deposition are OVERRULED. Although the court was sympathetic to plaintiff's objections at trial, closer examination of Civ.R. 32(A), and the pertinent case law, reveals that there is no distinction between use of a trial or a discovery deposition and that the discovery portion is clearly admissible under the circumstances of this case. Moreover, the mandate of Civ.R. 1(B) is that "[t]hese rules shall be construed and applied to effect just results by eliminating delay *** and all other impediments to the expeditious administration of justice." In accordance with that principle and Civ.R. 32(A)(3)(e), defendant's portion of Dr. Ranginwala's deposition is hereby admitted as Exhibit "C." However, the Civ.R. 30(F)(3) objection raised in defendant's reply is OVERRULED.

{¶5} With respect to the merits of plaintiff's damages claim, the court finds and concludes as follows.

{¶6} On July 1, 1997, plaintiff was involved in an accident wherein her motor vehicle was struck broadside by a tractor-trailer truck. As a result, she sustained multiple physical injuries including blunt head trauma, lacerations of the head and neck, a neck sprain, concussion, fractured ribs, a pulmonary puncture, a dislocated left shoulder, right femur and right knee injuries, dental injuries, as well as multiple bodily abrasions and contusions. Plaintiff was treated at Community Hospital of Springfield, Ohio and released on July 4, 1997. She followed up with various physicians and health care providers and convalesced at home for several months thereafter. In October 1997, she returned to work; her employment continued until October 2000. There is no question that plaintiff deserves to be compensated for her unpaid medical bills, unreimbursed work loss and pain and suffering attributable to the accident.

{¶7} The more difficult question in this case, and the focus of the evidence and testimony presented at trial, is whether plaintiff's permanent, total disability, beginning in October 2000, is related to the injuries sustained on July 1, 1997. Much of that determination turns upon credibility of witnesses who, in addition to plaintiff, include the numerous physicians who have diagnosed and treated her since the date of the accident. There are conflicting opinions among the physicians as to the diagnosis for plaintiff's current medical conditions and whether any of those conditions relate to the accident. For example, plaintiff has been diagnosed with reflex sympathetic dystrophy (RSD),[1] Raynaud's

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[1] According to the medical experts, this disorder is now known as Complex Regional Pain Syndrome. For ease of reference, the parties and physicians used the term "RSD" throughout these proceedings.

disease, carpal tunnel syndrome, Scleroderma and Sjoren's. Of these diagnoses, only RSD and carpal tunnel syndrome could potentially be caused by trauma. All of the other conditions are classified as autoimmune disorders and cannot be triggered by traumatic injury such as a motor vehicle accident.

{¶8} The court has reviewed voluminous medical records chronicling plaintiff's post-accident progress and treatment, and has read the deposition testimony of Drs. Neil Cole, Mujeeb Ranginwala, and Gerald Steiman. Of the many physicians who have treated plaintiff, the two most divergent opinions are those of Drs. Cole and Steiman.

{¶9} Dr. Cole, a neurosurgeon, treated plaintiff several times after her release from Community Hospital in July 1997. At the time he initially saw her, on August 15, 1997, she complained of neck pain and dizziness. Dr. Cole attributed her symptoms to a cerebral concussion and associated cervical sprain; he referred her for x-rays and followed up with her in October and November 1997. Plaintiff did not see Dr. Cole again until August 27, 1999, when he examined her upon referral from Dr. Raganathan, a neurologist. The purpose of that visit was to obtain Dr. Cole's opinion as to whether plaintiff's symptoms could be attributed to cervical disk herniation.

{¶10} It was not until February 2000 that Dr. Cole began seeing and treating plaintiff on a regular basis. By March of that year he had diagnosed her as suffering from bilateral carpal tunnel syndrome. In his deposition, Dr. Cole described that condition as follows: "[i]t is basically a compression of the median nerve. There are two major nerves that come into the hand. The median nerve travels through what's called a carpal tunnel. And when you get carpal tunnel syndrome, generally what happens is that tunnel gets too small, and it causes compression of the nerve and the --

and the arteries and veins that run through that area." Dr. Cole went on to explain that an electromyogram (EMG) is a definitive test for determining whether a patient has carpal tunnel syndrome; however, that test does not determine the cause of the condition. According to Dr. Cole, the condition can occur as a result of trauma, such as a motor vehicle accident, or from a variety of other reasons such as hormonal imbalances, thyroid problems or performance of repetitive work tasks.

{¶11} Later in the year, Dr. Cole began to suspect that plaintiff also had RSD. In July 2000, he spoke with plaintiff for the first time about this disorder. According to Dr. Cole, the disorder can result from "a partial injury, usually to a peripheral nerve, one of the major peripheral nerves." That type of injury could occur as a result of a motor-vehicle accident. Dr. Cole went on to describe the condition as one where "in the process of having that partial injury, the autonomic nervous system can begin to malfunction. And as a result of that, people can get severe pain. *** usually this is either in the upper or lower extremities." In October 2000, Dr. Cole implanted an epidural stimulator in an effort to ease some of plaintiff's pain. However, she subsequently reported that it provided little or no relief; she consistently maintained that position up to the date of the damages trial in this case. Plaintiff never returned to work after the implant surgery.

{¶12} Ultimately, Dr. Cole concluded that there were no further neurosurgical options available for plaintiff, and declared her permanently, totally disabled as a result of carpal tunnel syndrome and RSD. In his deposition, Dr. Cole opined: "I believe, to a reasonable degree of medical certainty, that Ms. Kuss developed a bilateral carpal tunnel syndrome related to her motor vehicle accident, and this subsequently led to the development of the

reflex sympathetic dystrophy." Dr. Cole has also acknowledged that plaintiff has Raynaud's disease; however, it was his opinion, as well as other physicians who treated plaintiff, that RSD can coexist with Raynaud's. Dr. Cole was unequivocal in stating that having Raynaud's does not make plaintiff any more or less disabled than she was with RSD.

{¶13} In stark contrast, Dr. Steiman, a neurologist, has opined that, to a reasonable degree of medical certainty, "Ms. Kuss' physical examination provided absolutely no explanation of her current symptom complex." Further, with the exception of the medical evidence of Raynaud's, Dr. Steiman was of the opinion that "[e]verything else was embellishment or magnification." According to this physician, plaintiff does not have RSD, and "never had RSD ever." Dr. Steiman served as defendant's expert in this case, and formed his opinions in connection with an independent medical exam of plaintiff.

{¶14} In his deposition, Dr. Steiman was asked whether a hallmark of RSD would be burning pain. In response, he stated:

{¶15} "It is very important, I think, to understand what's going on with Ms. Kuss with respect to this diagnosis, the burning pain diagnosis and such. Ms. Kuss was in an accident. She had multiple injuries. *** But then Ms. Kuss goes back to work. She works for quite some time. She's doing her job. She sees a doctor for bronchitis, and then [her attorney], according to Ms. Kuss, suggests that she goes to see a doctor for headaches and dizziness.

{¶16} "And after some time we get a mushrooming of symptoms which go from headaches and dizziness to pain throughout the body, allodynia, hyperpathia and such.

{¶17} "And she goes to see a number of doctors and they do this test, that test, and the other test, x-ray, EMG, and they're not helpful. Those tests don't allow them to get an answer. And they

come to the conclusion that, well, I guess she has RSD and let's do this and that and the other. And if you ask Ms. Kuss, it didn't work at all.

{¶18} "Well, thankfully, she sees another type of doctor. She sees Dr. Rang[i]nwala. Dr. Rang[i]nwala, it appears from his records,

{¶19} isn't willing to accept what someone else says. Approaches it and says I'm going to do some tests. I'm going to do some blood tests and such to see what's going on. And low and behold, Dr. Rang[i]nwala comes to the conclusion that she's got an immune disease called Scleroderma with Raynaud's phenomenon. And that is the cause of Ms. Kuss's problem. Perhaps if those tests were done at the beginning we wouldn't have been in this mess. But in my way of thinking, Ms. Kuss has developed scleroderma with Raynaud's phenomenon. Oh, in terms of timing, sometime in the spring of '99 when her symptom complex began.[2] And when looking backwards, you -- with the advantage of hindsight, you can see in May of '99 and thereafter how in retrospect all of her complaints are consistent with scleroderma and consistent with Raynaud's."

{¶20} These are only two of the opinions reviewed in making the instant determination; they are singled out because they demonstrate the complexities faced by the court in understanding the diagnosis and treatment of plaintiff's condition. The physicians themselves acknowledge that the symptoms of RSD and Raynaud's "overlap" and can be virtually indistinguishable. Similarly, the symptoms of scleroderma can overlap with RSD and Raynaud's. While RSD and carpal tunnel syndrome could be caused by the 1997 accident, none of the other conditions can be. Even Dr.

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[2] Plaintiff's counsel interposed an objection at this point; however, it was overruled upon review by this court during the course of the damages trial.

Cole admitted that he could not pinpoint a degree or percentage of disability attributable to RSD, as opposed to Raynaud's or scleroderma. He further stated that he had one patient who developed the disorder after simply bumping her elbow.

{¶21} Moreover, two additional factors that complicate this determination are that, by her own admission, plaintiff heavily abuses alcohol on a daily basis and daily smokes more than one pack of cigarettes. While these factors would appear irrelevant to the decision making process, they are pertinent here because many of the symptoms plaintiff claims to experience, such as dizziness, memory loss, irritability, irregular sleeping patterns, and a tendency to drop things may be attributable to one or more of the conditions she has been treated for, or may be caused or exacerbated by her alcohol abuse. Plaintiff's smoking pattern is a consideration because it exacerbates symptoms of Raynaud's, which may be indistinguishable from symptoms of RSD.

{¶22} Finally, there is little disagreement among the physicians that the diagnosis of RSD and carpal tunnel syndrome is primarily "clinical." Simply stated, that means that much of the determination depends upon the symptoms reported by the patient. As such, plaintiff's credibility is inextricably intertwined with her diagnosis and subsequent treatment.

{¶23} In the court's view, plaintiff's subjective complaints lacked credibility. Her expressions and comments regarding her ability to perform day-to-day activities appeared to the court to be feigned or overly exaggerated. Further, as to the quality of her daily life, plaintiff stated that a typical day for her consisted of "nothing"; that she essentially drank and watched television all day. She maintained that she could not cook meals, do laundry, dress herself or apply make-up; however, she could open beer cans, and drive if necessary. The court does not intend to

minimize the difficulties faced by a person in plaintiff's circumstances; however, the court does find from the evidence that there are engaging activities that plaintiff could become involved in if she chose to do so.

{¶24} With these considerations in mind, and based upon the totality of the evidence, the court finds that plaintiff failed to prove by a preponderance of the evidence that defendant's negligence was the proximate cause of her permanent, total disability. In so holding, the court does not fully accept the opinion of either Dr. Cole or Dr. Steiman. Rather, the court simply concludes that if plaintiff does, in fact, have RSD and carpal tunnel syndrome, the evidence fails to demonstrate that the conditions are proximately related to the July 1, 1997, accident. Accordingly, no damages shall be awarded for any treatment received in connection with the diagnosis and treatment of those disorders, nor will any wage loss incurred as a result of such treatment, or plaintiff's subsequent disability, be reimbursed.

{¶25} Notwithstanding the above conclusions, plaintiff is entitled to the damages proximately caused by the accident, including pain and suffering, the cost of her care and treatment related to those injuries, and her associated work loss. Based upon the evidence and testimony presented, the court calculates the above-referenced losses to total $41,209.24, consisting of $16,209.24, in unpaid medical expense and $25,000 for pain and suffering. The court finds no evidence that plaintiff incurred unreimbursed work loss.

{¶26} In accordance with R.C. 2315.19, and this court's previous decision, the damages award shall be reduced by 50 percent and judgment entered in the amount of $20,604.62, plus $25 for the filing fee paid to initiate this action.

{¶27} This case was tried to the court on the issue of plaintiff's damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of $20,629.62, which includes the filing fee paid by plaintiff. As stated in the court's previous decision with regard to liability, plaintiff's damages have been reduced by 50 percent, to account for plaintiff's contributory negligence. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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FRED J. SHOEMAKER
Judge

Entry cc:

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