

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALISSA M. SMITH,	§	
	§	No. 132, 2003
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
KAREN GARNESKI and	§	in and for New Castle County
FRANK GARNESKI,	§	
	§	C.A. No. 99C-05-212
Plaintiffs Below,	§	
Appellees.	§	

Submitted: September 11, 2003
Decided: November 17, 2003

Before **VEASEY**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 17th day of November, 2003, on consideration of the briefs of the parties, it appears to the Court that:

1) Alissa M. Smith appeals from an adverse judgment in a personal injury claim. She argues that the trial court erred in: 1) limiting the testimony of her medical expert; 2) excluding the testimony of her biomechanical expert; and 3) giving an inaccurate curative instruction concerning her medical expert's conclusions.

2) On May 30, 1997, as Karen Garneski was driving to work, Smith's car struck the rear bumper of Garneski's car. The collision occurred at very low speed, and neither car suffered more than minimal damage. Although Garneski reported no

injury at the time of the accident, she began feeling pain in her head, neck and shoulder within a few hours. Garneski sought medical treatment at the Christiana Hospital Emergency Room, and, a few days later, consulted her family doctor. An MRI scan taken approximately ten months after the accident revealed disc herniations and spurring in the cervical spine.

3) Prior to trial, Bradley Probst, a biomedical engineer, reviewed various records relating to the accident and concluded that Smith's car was traveling at 5 miles per hour or less at the time of impact. Probst also concluded that the impact produced a force of approximately 2.3 G's of acceleration on Garneski's body. He opined that the force of impact from the car accident was equivalent to the impact of a cough or a slap on the back. Dr. Richard I. Katz, who examined Garneski, her medical records, and the Probst report, concluded that "reasonable initial diagnoses could include cervical and shoulder sprain" and that those conditions had resolved.

4) Garneski moved to exclude Probst's report as well as Katz's opinion that the accident did not cause her herniated discs. The Superior Court granted the motion on the ground that the Katz report did not expressly state the disputed conclusion and Garneski would be prejudiced by the last minute change in testimony. Since Katz was precluded from testifying about anything not within the four corners of his report, Probst's testimony also was excluded as lacking in probative value.

5) During *voir dire*, Katz testified that spurring and disc herniation are manifestations of the degenerative process, and that these problems usually do not cause pain. He explained that the degenerative process, rather than trauma, was the most likely explanation for the disc herniation shown on Garneski's 1998 MRI. On direct examination, Katz again testified that the disc herniation shown on Garneski's x-ray indicated a degenerative process that predated the accident. He also testified that, as a rule, disc herniations from the degenerative process are asymptomatic.

6) Garneski objected and asked for a curative instruction. The Court then instructed the jury:

Ladies and gentlemen of the jury, counsel has raised certain objections, because some of the questions and answers during Dr. Katz's testimony have been inconsistent with conclusions previously reached by Dr. Katz.

Those conclusions are: that the plaintiff's disc herniation did not preexist; in other words, was not existing before the accident in question; and his other conclusion was that the plaintiff's disc herniation was not caused by any preexisting condition.

7) It appears that the court was attempting to cure the prejudice caused by Katz testifying, indirectly, that Garneski's disc herniations were not caused by the accident. That *was* his opinion, but the court had excluded it because the opinion was not expressly stated in Katz's written report. The problem with the court's curative instruction is that it misstated Katz's opinion.

8) The trial court has broad discretion to fashion a curative instruction when the jury has heard inadmissible testimony. That instruction cannot, however, misstate the witness's testimony or expert opinion. In this case, where the medical expert testimony was a central issue, we conclude that the inaccurate instruction was reversible error.*

9) In light of our decision to reverse, we need not reach the other two issues on appeal because, in a new trial, there will be no surprise or other prejudice to Garneski that would preclude Katz from offering his opinion in its entirety.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is REVERSED. This matter is REMANDED to Superior Court for a new trial. Jurisdiction is not retained.

BY THE COURT:

/s/ Carolyn Berger
Justice

*See: *Commonwealth v. Crawford*, 305 A.2d 893, 895 (Pa. 1973).