

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-3030

ERNEST GIUSTI, JR.,

Plaintiff-Appellant,

VERSUS

CHARLENE B. COLEMAN, ET. AL.,

Defendants,

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-90-2359 "J")

(February 19, 1993)

Before Smith, Reavley and DeMoss, Circuit Judges

DEMOSS, Circuit Judge:*

I.

Ernest Giusti Jr. sustained several injuries when he was involved in a rear end automobile collision with Charlene Coleman on August 4, 1987. Giusti's wife drove him to Hotel Dieu Hospital

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

on the night of the accident and Giusti filled out the emergency room paper work and saw the triage nurse. However, he left the hospital before any medical treatment could be rendered and did not list knee pain as a complaint on the Hotel Dieu forms. He flew to Las Vegas on the night of the accident for a vacation and did not seek medical treatment for over twenty days.

On August 24, 1987, Giusti visited Dr. Charles Billings and complained of neck and knee pain. Dr. Billings observed that the knee was not swollen and had full range of motion. X-rays revealed no problems with the knee. Dr. Billings diagnosed Giusti with a neck strain and left knee hamstring strain. Giusti saw Dr. Billings several more times and continued to complain of pain in his left knee.

On January 6, 1988, Giusti saw Dr. Ray Haddad, an orthopedic surgeon, for the knee pain. In March, 1988, Giusti stopped treatment by Dr. Haddad. Six months later, Giusti returned to Dr. Haddad, who recommended a magnetic resonance imaging scan. The scan revealed a serious problem with Giusti's knee. Dr. Haddad operated on the knee but four years later, Giusti still complains about the pain in the knee. While recovering from the surgery on the knee, Giusti suffered a life-threatening pulmonary embolism.

Giusti initially sought damages from Charlene Coleman. Ms. Coleman settled for the limits of her John Hancock Insurance Company policy for \$10,000. Giusti had \$100,000 in underinsured motorist coverage and \$25,000 in medical payment coverage with State Farm Mutual Insurance Company (State Farm). Giusti submitted

claims to State Farm for damage to his vehicle and for medical expenses for the amount of \$20,856.04. State Farm paid Giusti for the damage to his vehicle and \$2,000 of his medical expenses. Giusti filed this action against State Farm in the United States District Court for the Eastern District of Louisiana to recover the additional medical expenses.

The trial was before the court on the issue of damages alone. The district court found that Mr. Giusti's knee injury was limited to a hamstring strain and that the knee surgery and embolism were not related to the accident. The judge awarded damages of \$ 5,000 for Giusti's hamstring strain and \$2,500 for his cervical strain injury. The Court also awarded \$1,030 in medical expenses for Dr. Billings' charges for his treatment of the hamstring and the neck. Because the damage award did not exceed the amounts of his prior settlement with John Hancock, State Farm was not obligated to pay any damages.

On appeal, Giusti contends that the Court erroneously concluded that the knee injury and the pulmonary embolism were not related to the accident because the Court's findings were in direct conflict with the testimony of Giusti's treating physicians and of Giusti and his wife and the medical records. Giusti claims that he should have been awarded damages for both his knee surgery and his pulmonary embolism; and that the damages awarded for the hamstring and neck injury are inadequate. Giusti also complains that the trial court failed to award any damages for his financial losses and claims the trial judge erred in failing to award additional

compensation for State Farm's arbitrary and capricious handling of his claim.

Because we find that the trial court did not err in holding that Giusti was not entitled to damages for the knee surgery, we will not address the issue of the pulmonary embolism which Giusti alleges resulted from that surgery.

We AFFIRM.

II.

Giusti first claims that the district court erred when it found that there was no evidence definitively linking the knee injury to the accident.

The legal standard for overturning a trial court's assessment of damages is whether the trial court's finding is clearly erroneous. A finding is clearly erroneous "when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed." Albany Ins. Co. v. Bengal Marine, Inc., 857 F.2d 250, 251 (5th Cir. 1988).

Giusti bases his argument that the knee injury was related to the accident upon his own testimony and the testimony of Dr. Charles Billings and Dr. Richard Meyers.¹

The trier of fact is entitled to weigh the credibility of the witness and to value his testimony in light of his demeanor on the stand. Webster v. Offshore Food Service, Inc., 434 F.2d 1191 (5th

¹ Dr. Meyers' testimony concerning Giusti's physical condition was based on (i) the medical records of Dr. Ray Haddad who was deceased at the time of trial and (ii) his own single medical examination of Giusti.

Cir. 1970) citing Sartor v. Arkansas Nat. Gas Corp., 321 U.S. 620, 64 S. Ct. 724 (1944) The trier of fact is not bound by expert testimony and may substitute its own common-sense judgment for that of the experts. Moore v. Johns-Manville Sales Corp., 781 F.2d 1061, 1065 (5th Cir. 1986). As to this rationale, however, the trier of fact "would not be at liberty to disregard arbitrarily the unequivocal, uncontradicted and unimpeached testimony of an expert witness, where . . . the testimony bears on technical questions of medical causation beyond the competence of lay determination." Id.

The trial judge in this case found that the knee surgery did not result from the accident for several reasons.

First, Giusti did not complain about knee pain at the hospital following the accident and did not complain of knee pain until two weeks after the accident when Dr. Billings diagnosed the injury to his knee as a hamstring pull.

Second, Giusti did not exhibit any objective signs of the injury during his initial visits to the doctors.

Third, Dr. Haddad diagnosed chondromalacia or softening of the cartilage in the knee, which all doctors testified could very probably be due to the passage of time and to normal wear and tear changes. The judge gave credibility to this theory, given Giusti's obesity and work history of moving video games around town.

Fourth, the district court found that "Giusti was less than forthright in his testimony concerning both his injuries and the extent of his damages"; and did not believe Giusti's claim that his knee was fine before the accident.

Giusti argues that the trial judge erred in his finding because Giusti's treating doctors testified that they thought the surgery was "probably" related to the accident. However, the record also reflects that both doctors testified that the knee injury could be due to normal wear and tear. Thus, the expert testimony presented at trial did not constitute the type of "uncontradicted and unequivocal" medical testimony which would preclude the judge from arriving at his own view of the causation of the knee problem which required surgery. The judge believed the "normal wear and tear" theory and we cannot disturb this finding on appeal.

Moreover, the record supports the district court's conclusions as to the credibility of Giusti's testimony.

Because the evidence supports the trial court's finding that the knee injury was not attributable to the accident, the medical bills arising out of the Tulane visits or arthroscopy are not compensable.

Giusti next objects to the amount of damages awarded by the trial court for the hamstring, cervical and neck injury. The district judge supported his calculation of the amount of damages with cases awarding similar amounts in similar cases. Rios v. National Tea Company, C.A. No. 89-2900 (E.D. La. March 7, 1991). See also Joseph v. Mid-American Indemnity Co., 532 So. 2d 347 (La. App. 3rd Cir. 1988), Pattison v. B.F. Goodrich Co., 522 So. 2d 1212 (La. App. 4th Cir. 1988). The judge did not abuse his discretion and we find no error.

Giusti also argues that he should have received damages for financial losses to his businesses. He claims he worked about 100 hours a week prior to the accident and only 70 hours a week after the accident. Evidence in the record establishes that a burglary affected one of his businesses and that Giusti sold his rental properties because they were "more headaches than they were worth." Moreover, there was sufficient evidence to show that Giusti was working 70 plus hours a week shortly after the accident. The evidence sufficiently supports the district court's verdict.

Finally, Giusti argues he is entitled to statutory fees and penalties allegedly owed by State Farm for its refusal to pay the claim asserted by Giusti. Giusti's damages of \$8,530 did not exceed the \$10,000 paid to Giusti by the tortfeasor's insurer. Thus, State Farm's is not obligated to pay damages. Lacour v. Travelers Insurance Co., 502 So.2d 209 (La. App. 3rd Cir. 1987).

III. CONCLUSION

We affirm the holding of the district court.