STATE OF MICHIGAN

14TH CIRCUIT COURT FOR THE COUNTY OF MUSKEGON
BUSINESS COURT DIVISION

SHAUNA K. PELL
Plaintiff,

File No. 13-49289-CK
Hon. Neil G. Mullally

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,
Defendant.
_______________________________/

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OPINION

This litigation is based upon the Plaintiff's claim for personal protection benefits from her own insurer, the Defendant, under MCL 500.3107, which is part of what is commonly referred to as Michigan's statutory no-fault vehicle insurance plan. Such personal protection benefits are typically called first-party benefits, and include lost wages, replacement service expenses, medical expenses, rehabilitation expenses, and other benefits. The Plaintiff claims damages for benefits that were denied, and for the alleged unreasonable delay in Defendant paying the benefits that were actually paid. Plaintiff is also claiming attorney fees, which is supported by MCL 500.3148. The Defendant's position is that the Plaintiff has received all the personal protection benefits to which she is entitled, that there was not an unreasonable delay in paying the

personal protection benefits which she received, and that no penalties or attorney fees should be assessed against the Defendant.

The initial facts surrounding the accident are the following. On the afternoon of July 12, 2012, at about 5:00 p.m., the Plaintiff, then age 54, was driving home alone in a 2009 Dodge Neon from her job as a phlebotomist at Mercy Hospital. She was wearing her seatbelt and was stopped for a red light on the major street of Sherman Boulevard. Hers was the second from the front of a line of three vehicles waiting at the light, when a fourth car “rear ended” the car behind the Plaintiff. That impact caused a chain reaction, which pushed the third car into the rear of the Plaintiff’s car, which in turn struck the first car in front of the Plaintiff. The Plaintiff’s air bag did not inflate, and her car was drivable after the accident. Shortly after the accident, the Plaintiff visited the Mercy Hospital Emergency Room. The ER physician ordered an x-ray of the Plaintiff’s thoracic spine, and a CT scan of the Plaintiff’s cervical spine. The x-ray found nothing significant as to the Plaintiff’s thoracic spine. The CT scan found narrowing of the C5-C6 disc space, with bony and vascular degenerative changes in the cervical spine, (X-ray and CT scan records of July 12, 2012, included in deposition of Dr. Mark Moulton, M.D., of December 5, 2014). After examining the Plaintiff, the ER physician sent her home and told her to follow up with her primary care doctor, Dr. Shelly Williams, D.O.

The Plaintiff saw Dr. Williams soon after the accident. There is no testimony or medical records from Dr. Shelley Williams in evidence. However, the Plaintiff testified that she saw Dr. Williams for neck pain, back pain, and hurting head. The Plaintiff testified that Dr. Williams put her on pain pills, (per Plaintiff’s Exhibit 7, the pain pills were Norco), and also on Valium as a muscle relaxer. Dr. Williams did not authorize the Plaintiff to return to work, and the Plaintiff has not worked since the accident.

Because the Plaintiff's pain condition did not improve over time with prescription drug treatment, on September 19, 2012, Dr. Williams referred the Plaintiff for physical therapy from the provider Generation Care. The Plaintiff received physical therapy there between October 2, 2012, and November 15, 2012. Her physical therapy records for that time period are found in Plaintiff's Exhibit 7. The Plaintiff then had complaints of "pain along the left side of her neck, periscap region, L pec region, and B thighs." Her diagnosis' codes were 724.1 Pain in thoracic spine, and 723.1 Cervicalgia. The physical therapist noted that "motion of B shoulders increased pain in all directions, actively." The physical therapist's assessment resulted in this clinical impression and treatment plan:

> CLINICAL IMPRESSION: Shauna has symptoms related to MVA on 7-12-12, which have caused limited R cervical motion and flexion, L pectoral pain, periscap pain with limited thoracic mobilization and rib mobilization (which is causing difficulty breathing), and anterior thigh pain (possible due to pushing with B legs on brake petal to stop her car from moving into the car in front of her). She will benefit from pain management techniques and IFC initially to control the mm spasms and then manual therapy for mobilization of cervical and thoracic spine/rib. She will also be working on therapeutic exercises and HEP.
>
> SHORT AND LONG TERM GOALS:
> 1. She will be independent and compliant with HEP.
> 2. Increase cervical AROM to the right and with flexion to wnl, so that she can tolerate driving.
> 3. Increase tolerance for sitting to greater than 5 minutes.
> 4. Increase walking tolerance to greater than 30 minutes for grocery shopping and return to work.
> 5. Decrease maximal pain level to less than 4/10 with standing for 10 minutes for household activities/adls.
>
> PLAN:
> Recommend therapy 3 times/week for 4 weeks to work on goals listed above. We have been currently authorized from BCN for 6 sessions.

Shauna Pell's treatment session's progress notes over the next approximately six weeks noted that her pain was mostly in her shoulders, neck, and back, and she "hurts to breath." (Plaintiff's Exhibit 7, Progress Note 10/11/2012). "Motion of both shoulders increased pain in all directions, actively." (Plaintiff's Exhibit 7, Progress Notes 10/6/2012, 10/10/2012, and 10/29/2012).

On October 31, 2012, the physical therapist noted that the Plaintiff was "complaining of an increase in back and neck pain – the pain is now extending into her arms." (Plaintiff's Exhibit 7, Progress Note 10/31/2012).

On November 5, 2012, the physical therapist initiated aqua therapy with the Plaintiff, and the Plaintiff continued to "complain of pain along mid scap and B shoulders into her cervical spine." (Plaintiff's Exhibit 7, Progress Note 11/5/2012).

At this time an MRI was done of the Plaintiff's cervical spine, and was compared with the CT scan results of July 12, 2012. This MRI had essentially the same findings as the earlier CT scan, i.e., multilevel degenerative spondylosis, most advanced at C5-C6. (MRI report of Dr. David Vickers, D.O. 11/6/2012; as part of deposition of Dr. Mark Moulton, M.D., of December 5, 2014.)

After three more additional aquatherapy sessions, on November 15, 2012, the Plaintiff discontinued her physical therapy, and placed herself "on hold to follow up with her physician regarding continued pain and limited tolerance for ADLs." (Plaintiff's Exhibit 7, Progress Note 11/15/2012).

Soon after the motor vehicle accident on July 12, 2012, the Defendant began to pay to the Plaintiff her full lost wages and medical expenses. The Defendant did so even though the Plaintiff's no-fault insurance policy provided for "co-ordinated" benefits,

i.e., any lost income or medical benefits received from other sources could ~~possibly~~ be set off against the Defendant's first-party obligations.

Mercy Health, the Plaintiff's employer, furnished both short term and long term disability insurance coverage to the Plaintiff through the Hartford Insurance Company. However, the Plaintiff did not submit the required records requested by the Hartford Insurance Company to qualify her for the benefits. The Defendant's claim representative tried to help the Plaintiff obtain the records to qualify for the Hartford disability benefits, but the Plaintiff did not successfully follow through. Nevertheless, the Defendant continued to pay the Plaintiff's full lost income benefits without a set-off from the Hartford disability coverage.

After the discontinuation of the Generation Care physical therapy on November 15, 2012, Dr. Shelley Williams ordered a thoracic spine MRI on December 3, 2012. The results of that MRI were negative. (MRI report of Dr. Robert Fles, Jr., of 12/3/12, part of records of deposition of Dr. Mark Moulton, M.D., of 12/5/12.)

Dr. Williams also referred the Plaintiff to Dr. David Krencik, D.O., a pain control specialist at Michigan Pain Consultants. Dr. Krencik first saw the Plaintiff on December 26, 2012. The Plaintiff's chief complaint was the following list: 1. Neck pain, 2. Pain base of the head on the left, 3. Headache (frontal), 4. Mid-back pain, 5. Upper back pain. Dr. Krencik found that regarding the Plaintiff's right shoulder, "Impingement signs are negative. Active range of motion of the right shoulder is within normal limits. There are palpable tender trigger points, both anterior and posterior shoulder." After reviewing the Plaintiff's records and examining her, Dr. Krencik arrived at this assessment of the Plaintiff:

ASSESSMENT:

1. Significant depression with probable PTSD
2. Cervicalgia
3. Cervical radiculitis
4. Cervical spinal stenosis
5. Cervical spondylosis
6. Cervical degenerative disc disease
7. Occipital neuralgia on the left

(Letter of Dr. David M. Krencik, D.O., of 12/26/2012, part of Deposition of Dr. Jeffrey Recknagel, M.D., of 12/8/2014).

Dr. Krencik's treatment plan was first to use interventional procedures on that day after he examined the Plaintiff, consisting of a cervical epidural steroid injection in the C-7-T1 interspace, and an occipital nerve block in the high cervical area. He also referred the Plaintiff to physical therapy, prescribed 150 mg. per day of Paxil, and included a psychological evaluation and treatment as part of the treatment plan.

About one month later, on January 28, 2013, Dr. Krencik again saw the Plaintiff in his office. The Plaintiff continued to be in the same severe pain as in her original visit, and ranked the pain as 9 on a scale of 0-10. The Plaintiff reported that she had received 50% relief from her pain for about six days after her treatment procedures the month before. Dr. Krencik's assessment findings were the same as in the previous month, and he repeated both the cervical epidural steroid injection, and occipital nerve block.

Dr. Krencik's office notes of January 28, 2013, stated that the Plaintiff would return in four weeks to evaluate the outcome of the treatment provided on that day, and to determine future treatment. However, the Plaintiff instead saw an orthopedic surgeon, Dr. Mark J.R. Moulton, M.D. It is not clear whether Dr. Williams or Dr. Krencik referred the Plaintiff to Dr. Moulton, or whether she sought out Dr. Moulton herself.

Dr. Moulton first saw the Plaintiff on February 19, 2013. Dr. Moulton found the Plaintiff to be "tearful, miserable, couldn't move her neck, was very limited." (Deposition of Dr. Mark Moulton of 12/5/14, p. 7). Dr. Moulton found that the Plaintiff had a small herniation of the disc at C5-C6 of her cervical spine, and recommended surgery, i.e., "an anterior body fusion at the C5-6 level," because all previous treatment methods had failed. (Plaintiff's Exhibit 1, Moulton office notes of 2/19/2013, p. 1). During his examination of the Plaintiff, Dr. Moulton found both her right shoulder and left shoulder to be normal, with full range of motion. (Moulton deposition, pp. 21-24).

Dr. Moulton performed the fusion surgery on March 20, 2013, and after post-operative rehabilitation, both Dr. Moulton and the Plaintiff determined that the Plaintiff obtained an excellent result that relieved her neck pain. However, after the surgery and throughout her post-operative recovery months, the Plaintiff complained of acute pain in her right shoulder. The Plaintiff again participated with Generation Care physical therapy after this surgery, from May 16, 2013 until August, 2013. Dr. Moulton treated the Plaintiff's right shoulder pain with three injections over the following months, but without long-term success. Dr. Moulton then referred the Plaintiff to one of his partners, Dr. Jeffrey D. Recknagel, M.D., a specialist in shoulder surgery.

Dr. Recknagel first saw the Plaintiff on September 11, 2013. At that appointment the Plaintiff expressed to Dr. Recknagel that she was having severe pain in her right shoulder, rating the pain a 9 out of 10. She stated she was unable to sleep on her right shoulder, wash her back, fasten her bra, reach a high shelf, lift 10 pounds above her shoulder, or throw a ball overhand. She could not do her housework and laundry, and found it difficult to put on a coat or comb her hair. (Deposition of Dr. Jeffrey Recknagel of December 8, 2014, p. 7). After reviewing her medical history, Dr. Recknagel

performed a clinical examination of the Plaintiff's right shoulder. He found a restricted range of motion and his impression was that the Plaintiff had "persisting right shoulder pain following a motor vehicle accident, perhaps related to rotator cuff pathology,…" (Recknagel deposition, p. 8). Dr. Recknagel ordered an MRI of the Plaintiff's right shoulder, and she returned to see him on October 3, 2013, after the MRI was done on September 23, 2013.

At the October 3, 2013 appointment, the Plaintiff presented with the same symptoms as on her first visit, and Dr. Recknagel reviewed the MRI results with her. The MRI revealed that there was significant arthritis in the Plaintiff's shoulder joint. The MRI also showed a large tear in the Plaintiff's right shoulder rotator cuff in the supraspinatus tendon and a partial tear of her biceps tendon. (Recknagel deposition, p 28, Recknagel Deposition Exhibit 1, MRI report of 9/23/2013, and Recknagel office visit note of 10/9/2013). Dr. Recknagel's treatment plan was for arthroscopic rotator cuff repair, accompanied with removal of small amounts of bone from the acromion (acrimioplasty) and clavicle (distal claviculectomy). (Recknagel office visit notes of October 9, 2013.)

Dr. Moulton and Dr. Recknagel are in the same office and the Defendant at that point had not yet paid the hospital and surgical bills for Dr. Moulton's surgery on the Plaintiff's neck on March 20, 2013. After the Defendant paid Dr. Moulton's bill on December 6, 2013, Dr. Recknagel saw the Plaintiff on January 29, 2014, and again on May 7, 2014. On both visits her condition remained the same. On May 16, 2014, he then performed the surgical procedure mentioned in the preceding paragraph. The full description of the surgery is set forth in his Operative Note of May 16, 2014, which is part of Exhibit 1 of the Recknagel Deposition of December 8, 2014.

After her shoulder surgery, Shauna Pell engaged in physical therapy with Generation Care, and her post-operative recovery in the following months was unremarkable. Dr. Recknagel released her from his care on November 13, 2014 with no physical work restrictions. Up until that time, Dr. Recknagel had restricted the Plaintiff to left-hand work only.

Shauna Pell has not sought work or returned to any employment since Dr. Recknagel lifted her physical work restrictions. Shauna Pell cites psychological reasons for her inability to work.

When she saw the pain specialist, Dr. David Krencik, D.O., on December 26, 2012, the Court has already noted that Dr. Krencik found her to have "significant depression with probable PTSD." Dr. Krencik then referred the Plaintiff to Dr. Paul Delmar, Ph.D. Dr. Delmar is a licensed psychologist and certified rehabilitation counselor. He works for Michigan Behavioral Consultants, which in turn provides psychological services to Michigan Pain Consultants, where Dr. Krencik is employed. Dr. Delmar uses a multi-disciplinary approach to pain management for individuals who show a significant psychological component in their presentation. Since that initial referral, Dr. Delmar has treated Shauna Pell's psychological condition.

Dr. Delmar first saw the Plaintiff on March 6, 2013, which was two weeks before her neck surgery with Dr. Moulton on March 20, 2013. Dr. Delmar noted that Shauna Pell had "received injections to cervical region with pain radiating down right shoulder and arm." (Deposition of Paul Delmar, Ph.D., of 12/3/14, p. 7). Dr. Delmar found that "she openly presents with various symptoms of post-traumatic stress disorder." (Delmar deposition, p. 8) Dr. Delmar stated in his office visit notes of March 6, 2013:

> “She feels depression, financial pressure. She can’t sleep. She can’t drive in a car. She can’t ride in a car. She doesn’t like to go out. She weeps openly, doesn’t like being in the car…And then when gets in the car, she acknowledges that she breathes hard, she shakes. I think diarrhea before the car, fearful.” (Delmar deposition, p. 8)

Dr. Delmar diagnosed Shauna Pell with post-traumatic stress disorder with accompanying depression, as defined in Section 309.81 of the Diagnostic Statistician’s Manual, 5th Edition (DSM-5). It is also important to note that on December 4, 2013, Dr. Delmar also added a diagnosis of major depressive disorder as defined in Section 296.33 of the DSM-5, and that Dr. Delmar continued the dual diagnosis of PTSD and depression for the rest of his treatment of Shauna Pell.

After that initial appointment and diagnosis of March 6, 2013, Dr. Delmar had nineteen treatment sessions with Shauna Pell over the next twenty-one months. The last appointment that the Court is aware of occurred on December 3, 2014, just prior to Dr. Delmar’s deposition and one week before the trial of this case.

Over that twenty-one month period, Dr. Delmar employed a variety of counseling and cognitive and physical treatment techniques to address the Plaintiff’s pain, depression, and PTSD symptoms. Those treatment methods included breathing meditation, stress reduction exercises, relaxation techniques, problem solving, reality testing, positive reinforcement, anxiety management, depression management, increasing coping skills, autogenic training, and hypnosis for pain control, especially in her right shoulder. Dr. Delmar’s primary goals were to improve the Plaintiff’s condition to where she can drive a car and become employed. Dr. Delmar testified that Shauna Pell fully participated in her treatment. In fact, at a treatment appointment on December 4, 2013, when the Defendant had still not yet paid for the Plaintiff’s neck fusion surgery on March 20, 2013, and she had no resources to pay for her future right shoulder

surgery, Dr. Delmar designated her as a pro bono patient because of her motivation and sincerity in her treatment. (Delmar deposition, p. 21). Dr. Delmar treated her for the entire following year without compensation. As of the trial date on December 10, 2014, Shauna Pell could ride in a car but could still not drive a car, and she had no significant physical limitations preventing employment.

On August 9, 2013, the Defendant arranged for the Plaintiff to have an independent medical evaluation with Dr. Jeffrey Lawley, D.O. Dr. Lawley is an orthopedic surgeon who practices in the area of Lansing, Michigan. After reviewing Shauna Pell's medical records and taking her history, Dr. Lawley also did a physical exam. Dr. Lawley concluded that Shauna Pell had had a pre-existing degenerative neck condition that became symptomatic as a result of the car accident on July 12, 2012, and that the treatment and surgery she received were appropriate. Dr. Lawley also opined that Shauna Pell was capable of returning to work as a cytology assistant without limitations or restrictions. Dr. Lawley communicated his findings to the Defendant by his letter of August 27, 2013. (Deposition Exhibit 4, Deposition of Dr. Jeffrey Lawley of 10/22/14).

Following Dr. Lawley's evaluation the Defendant terminated the Plaintiff's lost wages benefits and medical benefits in September of 2013. That is also when the Defendant terminated the payment for the psychological services being provided by Dr. Delmar, which is when he classified the Plaintiff as a pro-bono patient. Eventually, the Defendant on December 6, 2013, paid the medical bills related to Dr. Moulton's fusion surgery.

As previously described in this Opinion, Dr. Jeffrey Recknagel, M.D., performed arthroscopic surgery on Shauna Pell's right shoulder on May 16, 2014, which had a

good result in relieving the Plaintiff's acute right shoulder pain. The Defendant refused to pay for that surgery, and this lawsuit had already been filed five months earlier. The Defendant refused to pay for the Plaintiff's shoulder surgery and psychological counseling without recognizing a sufficient causal relationship to the Plaintiff's auto accident.

To support that position in preparation for trial, the Defendant hired a licensed psychologist and college psychology professor, Dr. R. Scott Stehouwer, Ph.D., to conduct a review of the Plaintiff's treatment records with Dr. Delmar. Dr. Stehouwer conducted a paper review only, and never observed or examined the Plaintiff. Dr. Stehouwer's deposition was taken on November 24, 2014.

As articulated in his deposition, and in his summary letter of November 7, 2014 (Stehouwer Deposition Exhibit 2), Dr. Stehouwer criticized Dr. Delmar's diagnosis and treatment for several reasons. Dr. Delmar did not administer a written diagnostic tool such as the MMPI. Dr. Delmar's PTSD diagnosis was incorrect because the auto accident was not a sufficiently traumatic event, such as a threat of death or serious injury, that would cause the Plaintiff to experience PTSD. Dr. Stehouwer also did not believe that Dr. Delmar's diagnosis of PTSD was supported ~~also~~ because although the Plaintiff was avoiding riding and driving in cars and was having nightmares, she did not appear to be re-living the accident or having flashback experiences. Dr. Stehouwer also testified that the records did not show that the Plaintiff exhibited any forms of exaggerated startle response, which is often associated with PTSD. Dr. Stehouwer testified that instead of the treatment methods used by Dr. Delmar, he believed that the proper treatment method for PTSD is either systematic desensitization or eye movement desensitization regimen, (EMDR). Dr. Stehouwer testified that rather than

PTSD, the Plaintiff's immobilization with fear and anxiety would be more associated with a phobic type of disorder instead of PTSD. (Stehouwer deposition, p. 25). Dr. Stehouwer also testified that Dr. Delmar's treatment methods were more akin to dealing with pain management instead of PTSD. (Stehouwer Deposition, p. 27). Dr. Stehouwer agreed with Dr. Delmar's findings of anxiety, and depression vis-à-vis Shauna Pell, which may have been aggravated by the car accident, chronic pain, job loss, financial stress, and other factors she experienced after the car accident (Stehouwer Deposition, p. 37). In summary, Dr. Stehouwer concluded that the Plaintiff had the same condition of depression and anxiety as she had before the car accident, and that she did not have PTSD.

The Defendant also retained Dr. David Frye, D.O., to conduct a records review of Shauna Pell's shoulder pain treatment and surgery. Dr. Frye practices in the field of orthopedics in the Grand Rapids, Michigan area. Dr. Frye's opinion was that the Plaintiff had a pre-existing degenerative shoulder, and that the motor vehicle accident did not aggravate her pre-existing shoulder pathology. (Exhibit A of December 3, 2014, deposition of Dr. David Frye).

After the car accident on July 12, 2012, Shauna Pell experienced setbacks with respect to her employment and income. Because her 12 weeks of Family Medical Leave of Absence was exhausted as of October 4, 2012, she lost her employer-provided medical, dental, and vision insurance coverage, and her job opening was posted and filled. On July 13, 2013, her employment with Mercy Health was terminated permanently because she did not return to work within the one year maximum period of medical leave. On September 9, 2013, the Defendant terminated the Plaintiff's lost

wages benefit of $598.40 per week based upon the independent medical evaluation of Dr. Jeffrey Lawley, D.O., in August of 2013.

In analyzing all of the foregoing evidence of facts and expert opinions, at the outset the Court notes that the Plaintiff, who was 54 years old at the car accident date of July 12, 2012, had a life-long history of working. After high school she worked as a waitress, as a machine operator and a quality assurance employee for a plastics manufacturer, and for twelve years as the manager of a busy gas station/convenience store. After the gas station/convenience store was sold she then attended in 2004 Ross Medical Education. She completed her course work as a phlebotomist and was hired by Mercy Hospital after her externship there. She had worked for Mercy Hospital for eight years before being injured in the car accident.

Shauna Pell has always been a hard-working citizen supporting herself and her family. There is no evidence to suggest that she has ever been a malingerer, a faker, a manipulator, a liar, or any other type of fraudster. To the contrary, the record shows that her work was always an important matter of self-respect in her life, and a pillar of her personality. To shirk employment runs wholly contrary to her history and character.

There is no disagreement between the Plaintiff and Defendant that the Plaintiff's neck surgery was causally related to the car accident. The bills for that surgery were submitted to the Defendant in April of 2013, and the Defendant received the Plaintiff's neck surgery records on May 2, 2013. Not until three months later, on August 9, 2013, did the Defendant arrange on independent medical evaluation with Dr. Lawley. After Dr. Lawley, in his letter of August 27, 2013, gave his opinion approving the necessity of the surgery, the Defendant then submitted the bill to a medical billing audit firm. That procedure resulted in payment being delayed even further, and the Defendant finally

issued the check on December 6, 2013. This payment was issued seven months after the Defendant's receipt of the bill and records. MCL 500.3142 provides that personal protection benefits are overdue if not paid within thirty days after the insurer receives reasonable proof of the fact and of the loss sustained, and that overdue payments bear simple interest at the rate of 12% per annum.

In this case, the Court finds that the Defendant's seven-month delay in paying the Plaintiff's neck injury bills was unreasonable. The Plaintiff's neck was asymptomatic before the car accident, and became symptomatic shortly afterward. Throughout the following summer, fall, and winter, the Plaintiff's treatment plan progressed from conservative to more aggressive, all with poor results. The final step to possibly relieve the Plaintiff's pain was the cervical fusion surgery recommended by Dr. Moulton. The Defendant had paid for the Plaintiff's neck pain treatment and therapy all along the way, and had already decided that the neck pain had a causal relationship with the car accident. Knowing the Plaintiff's treatment history, for the Defendant to take seven months to decide whether Dr. Moulton's surgical procedure and expenses were appropriate is an unreasonably excessive period of time. If the Defendant felt the need to "investigate" the fusion surgery, Dr. Moulton's records, billings, and even the Plaintiff herself, could have and should have been examined well before seven months. Therefore, under MCL 500.3142, the Court awards 12% interest for six months upon the expenses paid by the Defendant related to the Plaintiff's cervical fusion surgery. (The Court is allowing for the 30 day grace period in the statute, so the award is for six months of interest instead of seven months of interest.) Furthermore, pursuant to MCL 600.6013 and *Wood v DAIIE*, 413 Mich 573 (1982), the Plaintiff is entitled to judgment

interest upon this award, and the Court grants judgment interest upon said amount until paid.

During the period of time between her accident and her spinal fusion surgery with Dr. Moulton, Shauna Pell had complained of intermittent shoulder pain, which included her right shoulder. This is clear from the records of her physical therapy provider and her pain specialist. After her neck surgery, the right shoulder pain became frequent and severe, with the range of motion and functionality of her right shoulder being markedly restricted. She did not obtain permanent relief from her right shoulder pain until after the arthroscopic surgery performed by Dr. Recknagel on May 16, 2014.

The Plaintiff's position is that her right shoulder had been asymptomatic before the accident, and that the accident caused it to become symptomatic. The Defendant's position is that the shoulder had a pre-existing degenerative condition that was not affected by the accident.

The only defense expert who actually examined Shauna Pell was Dr. Lawley. When Dr. Lawley examined Shauna Pell on August 9, 2013, Dr. Lawley himself noted:

> In addition to having complaints of neck pain she also experiences intermittent pain that radiates into her right upper arm with intermittent tingling involving her right upper extremity. She denied having any similar complaints with her opposite left upper extremity. (Lawley Deposition Exhibit 1, page 4 of opinion letter.)

In Dr. Lawley's deposition the latest office record of Dr. Moulton's described by Dr. Lawley is dated April 9, 2013. However, there were two later office visits that the Plaintiff had with Dr. Moulton before Dr. Lawley's evaluation took place on August 9, 2013. Below are excerpts from the April 9, 2013, visit with Dr. Moulton, followed by excerpts from Dr. Moulton's office visit notes on May 28, 2013 and July 30, 2013. Because in his written evaluation report of August 27, 2013, the latest office record of

Dr. Moulton mentioned by Dr. Lawley is dated February 19, 2013, it is unclear to the Court whether or not Dr. Lawley had these office records of Dr. Moulton at the time of the independent evaluation on August 9, 2013:

> 04/09/2013: …She is having significant right shoulder pain after surgery, which I suspect is from me doing the surgery itself.
>
> 05/28/2013: …She is doing reasonably well with her neck, still having significant right shoulder pain.
> Procedure: I took the liberty to inject her shoulder today under sterile conditions. No complications occurred.
>
> July 30, 2013: …She is making good progress at this point. Her biggest complaint is her shoulder. Her neck pain is improving. Her arm symptoms have improved as well. I did take the liberty to inject her shoulder under sterile conditions today. I am going to have her see Dr. Recknagel. It did offer substantial pain relief. We will see how things progress. I will see her back in two months."
> (Moulton Deposition Exhibit 1).

The foregoing office visit notes show that the Plaintiff was experiencing severe right shoulder pain to the extent that Dr. Moulton began to administer injections into the Plaintiff's shoulder. Moreover, just ten days before Shauna Pell saw Dr. Lawley, Dr. Moulton had found that "her arm symptoms have improved," and he injected her shoulder and she experienced "substantial pain relief." None of the above significant information is included in Dr. Lawley's report. Also, due probably to the recent injection, the Plaintiff's shoulder may have been doing somewhat better when she saw Dr. Lawley.

In his deposition of October 22, 2014, Dr. Lawley speculated that possibly the Plaintiff was suffering from some nerve irritation in the right shoulder area after Dr. Moulton's surgery. Of course, we now know, as confirmed by imaging and Dr. Recknagel, Shauna Pell actually had two tears in her rotator cuff. Her right shoulder pain was much more than only nerve irritation.

The evidence in this case is unequivocal that the Plaintiff did not have serious right shoulder pain, certainly not debilitating right shoulder pain, before the car accident. After the accident she experienced severe neck pain, and some intermittent shoulder pain at times in both shoulders, and sometimes in her right shoulder. After her cervical fusion surgery, she began to experience periodic acute right shoulder pain, which grew chronic as time passed.

Based upon the expert testimony in this case, the Court finds that the sudden onset of acute right shoulder pain from the two rotator cuff tears was a sequela from the spinal fusion surgery performed by Dr. Moulton. Dr.Moulton's testimony in his de bene esse deposition expresses his expert opinion.

> And I've seen this very few times, but I have seen it in someone who-- When I do the surgery, we do something called transcranial motor potentials. So essentially we take electrodes and we put them on the motor cortex through their scalp onto their cranium above their motor cortex. And to be safe, we monitor both somatosensory evoked potentials as well as cranial potentials to see if there is something I'm doing during the procedure that is unsafe.
>
> Okay. So we have a baseline study, we pulse them with a jolt of electricity through their motor cortex and their body responds in a spastic – it's like a seizure, if you will. And it's for a fleeting second, but all the muscles contract. We actually put bite blocks in their – in their mouth so they don't bite down on the endotracheal tube and sever it. It's possible that that could happen and/or worse yet – you can always put that back if you needed to, but they can lacerate their tongue, okay, because the force generated is – it's not voluntary. It's much like a seizure. It's quite significant.
>
> And their arms are strapped to the side of their body and they're being pulled down with tape so I can visualize radiographically. And it is – I have seen it where people have developed a tear in their sub – or their supraspinatus or their rotator cuff with the force generated during monitoring. It's not common, but I can think of 2 or 3 episodes in 15 years where that happened. (Deposition of Dr. Moulton, pp. 8-9).

Dr. Moulton also explained that the electrical shocks are done more than once during the surgery. It is interesting to note that Dr. Moulton specifically mentioned seeing in previous cases tears caused by the electrical shocks in the supraspinatus tendon, which is the location of one of the Plaintiff's rotator cuff tears.

In summary, the Court finds that the car accident was a proximate cause of the Plaintiff's shoulder pain that prevented her from working, and that the Plaintiff is entitled to first party benefits related to her shoulder medical expenses and loss of wages.

With that finding, it is helpful to review why the car accident is a proximate cause of the shoulder symptomatology that followed Shauna Pell's cervical spine surgery.

Broadly speaking, Michigan law relating to proximate and intervening causes has not changed in the previous thirty years. For example, in *Gibbons v Horseshoe Lake Corp*, an unpublished opinion per curiam of the Court of Appeals, issued March 11, 2014 (Docket No. 311754), p 24, the court pointed to the following analysis:

> "An intervening cause, one which actively operates to produce harm to another after the negligence of the defendant, may relieve a defendant from liability." *Meek v Dep't of Transp*, 240 Mich App 105, 120; 610 NW2d 250 (2000), *overruled on other grounds by Grimes v Dep't of Transp*, 475 Mich 72; 715 NW2d 275 (2006); *see also McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). However, "[a]n intervening cause is not a superseding cause if it was reasonably foreseeable." *Meek*, 240 Mich App at 120.

McMillian, *supra* at 576, relies upon the torts restatement (2nd) by quoting:

> An "intervening cause" is defined in 2 Restatement Torts, § 441, p 465 as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was "reasonably foreseeable."

McMillian, *supra* at 576-77, quotes an earlier case, *Davis v Thornton*, 384 Mich 138, 147; 180 NW2d 11 (1970), which was itself quoting from 38 Am Jur, Negligence, §§ 58, 709, 710:

> "This Court has recognized a distinction between direct and intervening causal situations and set forth different tests for determining proximate cause in each:
>
>> 'It appears that the modern trend of judicial opinion is in favor of eliminating foreseeable consequences as a test of proximate cause, except where an independent, responsible, intervening cause is involved. The view is that once it is determined that a defendant was negligent, he is to be held responsible for injurious consequences of his negligent act or omission which occur naturally and directly, without reference to whether he anticipated, or reasonably might have foreseen such consequences.
>>
>> * * *
>> There is no need for discussing proximate cause in a case where the negligence of the defendant is not established, but when his negligence has been established, the proximate result and amount of recovery depend upon the evidence of direct sequences, and not upon defendant's foresight.' " (*Davis v Thornton, supra*, p. 147)

Although neither side suggests medical malpractice in this case, Michigan law does not even recognize medical negligence as breaking the proximate cause chain in both civil and criminal cases. Ultimately, "[t]he concept of an intervening cause is predicated upon foreseeability. For instance, a doctor's negligence in treating a wounded victim is foreseeable, therefore, it cannot be used by a defendant to exonerate himself from criminal liability for the wounding of the victim." *People v Webb*, 163 Mich App 462, 465; 415 NW2d 9, 10 (1987). In *Rachel Baldwin v Scott*, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2008 (Docket Nos. 275809 & 275830), the court concluded that "'negligent medical treatment of an injury is foreseeable and is ordinarily not a superseding cause that cuts off the causal contribution of the act that caused the injury.'" *Id*. at 21, *quoting Shinholster v Annapolis Hosp*, 471 Mich 540, 573-74; 685 NW2d 275 (2004)

Based on that authority, the surgical right shoulder injury is not an intervening cause. The Plaintiff required neck/spinal surgery and treatment after the accident. The neck surgery causing the injury, or aggravating a pre-existing condition, was a standard and foreseeable procedure, which included electrical impulses as a normal part of the surgery. Therefore, under *McMillian* and *Gibbons*, the first surgery was a reasonably foreseeable cause of the shoulder injury that does not relieve the Defendant of its obligation to cover the subsequent surgery and treatment of the Plaintiff's right shoulder.

For all of the above reasons, the Court grants the Plaintiff's request for first party benefits related to the Plaintiff's right shoulder surgery, treatment and recovery. She is also awarded 12% interest under MCL 500.3142, and judgment interest under MCL 600.6013.

The Court also grants to Plaintiff under MCL 500.3107, lost wages through November 13, 2014, when Dr. Recknagel released her for work without restrictions. That is also in the same time frame that Dr. Delmar stated that the Plaintiff can ride in a car. That would mean that the Plaintiff could seek transportation for work other than driving herself.

With regard to the Plaintiff's psychological condition after the accident, wherein she was unable to drive a car at all, and was eventually able to ride in a car, the thrust of the Defendant's expert testimony is that the Plaintiff does not have PTSD according to the strict definition of the DSM-5. Psychological conditions do not fit nicely into well-defined diagnostic boxes. Dr. Delmar, her treating psychologist, explained that the Plaintiff has PTSD symptoms, as well as other symptoms of anxiety and depression. The Defendant's own expert, Dr. Stehouwer, testified that the Plaintiff's condition was more like a phobia or phobic reaction than PTSD. The point is that debilitating

psychological symptoms were created by the trauma of the car accident. Dr. Delmar's psychotherapy and other treatment eventually restored the Plaintiff to a state where she could at least ride in a car in the fall of 2014. Therefore, the Court grants to Plaintiff the payment of Dr. Delmar's bills until the trial date of December 10, 2014, plus 12% interest under MCL 500.3142 and judgment interest under MCL 600.6013. If Dr. Delmar believes that psychotherapy after December 10, 2014, would be beneficial to the Plaintiff to achieve full capability to drive a car, he may submit those treatment charges to the Defendant. However, if the Plaintiff has reached maximum benefit vis-à-vis driving from Dr. Delmar's services, obviously those charges would not be appropriate.

Concerning the Plaintiff's request for attorney fees, it is apparent that the actions of Plaintiff's counsel did not directly effect the payment of the Plaintiff's neck surgery bills, other treatment bills, and the lost wage benefits that were terminated as of September 9, 2013. However, Plaintiff's counsel took action to represent the Plaintiff because of the unreasonable delay of the Defendant, and lack of communication of the Defendant with Plaintiff's counsel. In reality, Plaintiff's counsel obviously spent substantial time and effort preparing the neck surgery claim. The Court deems an attorney fee award of $2,600.00 be appropriate for the Plaintiff's attorney fees related to the neck surgery claim. (The Court is estimating approximately eight hours at $325.00 per hour.) However, the Court finds that the contingency fee agreement executed between the Plaintiff and her counsel on September 19, 2013, applies to the claims that were litigated and upon which the Plaintiff prevailed. The Plaintiff's financial condition supported entering into a contingency fee retainer contract, and the Defendant would not pay the damages awarded in this case without full litigation and trial. That is a

situation which fits the circumstances appropriate for legal representation based upon a contingent fee agreement.

The Court finds that Plaintiff's contingency fee agreement with her counsel is applicable, as explained in the foregoing paragraph, and the Court additionally awards from the Defendant the attorney fees and costs authorized by that agreement for all first party benefits accruing after September 9, 2013.

The Defendant has argued that the Court should set-off any lost wages benefits paid by the Defendant by the amount the Plaintiff could have received under the Hartford Insurance short-term and long-term disability policies. At the trial, Sarah Parks, the Defendant's Senior Claims Representative, testified explicitly that the Defendant had considered reducing the Plaintiff's lost wages benefits to reflect that set-off, but chose not to do so. The Court finds that the Defendant elected not to pursue that remedy, and the Court considers the Defendant to have waived that issue.

The Defendant has also raised the issue that the Defendant would have a claim upon any disability award if the Plaintiff were to receive federal disability compensation. That question was not and is not before the Court. However, the Court orders that Plaintiff shall keep the Defendant informed of the status of any such claim.

The Court leaves to the Plaintiff the resolution of reimbursement claims for Medicaid, Priority Health, or other health care providers.

A judgment shall be prepared and submitted in accordance with this Opinion and Michigan Court Rules. Costs are awarded to the Plaintiff.

Dated: March 20, 2015

Neil G. Mullally P22857
14th Circuit Business Court Judge

STATE OF MICHIGAN

14TH CIRCUIT COURT FOR THE COUNTY OF MUSKEGON
BUSINESS COURT DIVISION

SHAUNA K. PELL
Plaintiff,

File No. 13-49289-CK
Hon. Neil G. Mullally

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,
Defendant.
_______________________________/

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PROOF OF SERVICE

On the date below, I served a copy of Opinion upon the above parties, by first class mail with postage fully prepaid thereon and by email.

Dated: March 19, 2015

____
Kathy Larkin