

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

BONNEY BORDEN, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civ. No. 01-399-SLR  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

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Arthur M. Krawitz, Esquire, of Doroshow, Pasquale, Krawitz,  
Siegel & Bhaya, Wilmington, Delaware. Counsel for Plaintiff  
Bonney Borden.

Colm F. Connolly, United States Attorney, Patricia C. Hannigan,  
Assistant United States Attorney, United States Attorney's  
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Defendant United States of America.

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**OPINION**

Dated: 3/31/04  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

Plaintiff Bonney Borden initiated suit against defendant, the United States of America, claiming damages for injuries allegedly sustained as a result of her being hit by a vehicle driven by a United States Postal Service ("USPS") employee. A bench trial was conducted in March 2003. Following are the court's findings of fact and conclusions of law, pursuant to Fed. R. Civ. P. 52(a).

**II. FINDINGS OF FACT**

1. On February 16, 1999, plaintiff was thirty-six years old and owned a store where she sold groceries and also made sandwiches for sale. She performed all duties attendant to running the store, including using a slicer, cutting meats, and lifting and stocking inventory. Plaintiff also worked at Three Stars Pizza, an establishment owned by a friend and located some four to five blocks from her store. (D.I. 54 at 34-35)

2. On February 16, 1999 at approximately 5:45 p.m., plaintiff started to walk to Three Stars Pizza, where she was due for work at 6:00 that evening. Plaintiff was accompanied by her young son. Plaintiff and her son walked in the street, although it was already dark when they left. (D.I. 54 at 37, 43)

3. At approximately 5:55 p.m. on February 16, 1999, Tammy Lank, a USPS employee, drove to the vicinity of Three Stars Pizza to deliver the last mail of the day. Ms. Lank was driving a

white van identified as a USPS vehicle by the blue and white logo of an abstract eagle on the passenger door. (D.I. 54 at 64; DX 1-3) Ms. Lank was unfamiliar with the area around Three Stars Pizza. She had to drive around the neighborhood a few times to complete her deliveries. (D.I. 54 at 64, 66)

4. Three Stars Pizza is located on the corner of Forest Avenue and Kirkwood Highway, Wilmington, Delaware. As plaintiff and her son walked on Forest Avenue toward Three Stars Pizza, they passed the USPS van driven by Ms. Lank. There is no dispute that it was very dark at that time and place. Indeed, when asked to recall the events of that evening, neither plaintiff nor Ms. Lank correctly described the other. (D.I. 54 at 24, 27, 66) The dispute between the parties is whether the van was parked at the time of this meeting, or whether the van was moving and hit plaintiff in the way she has described.

5. Plaintiff testified at trial that she saw what she described as a "truck" (D.I. 54 at 40-43) driving around the neighborhood. It then stopped on Forest Avenue. According to plaintiff, she told her son to get up on the curb or grass, because there are no sidewalks on Forest Avenue. She was close to the curb, perhaps with one leg starting to go up on the curb, when the postal truck "took off" toward her. Plaintiff testified that the vehicle passed so close that she "felt the side" of it "in the front . . . sliding across . . . the side of [her] legs

and [her] hip" and the right side mirror (approximately 10 inches in length and 48.5 inches off the ground) hit her "on the front of her shoulder around the top of her arm." (D.I. 54 at 42-44)

6. Ms. Lank testified that she parked on Forest Avenue for 10 to 15 minutes while she delivered mail. She was returning to the van when she saw a woman and child walking toward her in the middle of the street. (D.I. 54 at 70, 76) According to Ms. Lank, she said hello to them, got back into the vehicle, put her seatbelt and lights on, looked in all her mirrors to make sure nobody was coming, and "took off." (D.I. 54 at 72) Ms. Lank testified that she exited the neighborhood by a side street other than Forest Avenue; i.e., she did not turn around and come back down Forest onto Kirkwood Highway. (D.I. 54 at 75) She returned to the Lancaster Avenue mail station around 6:30. (D.I. 54 at 66) Ms. Lank testified that she was certain that she did not strike plaintiff that evening with the van. (D.I. 54 at 69)

7. In addition to her testimony, plaintiff relies on the following evidence to support her liability contentions:

a. The testimony of Rita Stylianou, the owner of Three Stars Pizza and a friend. Ms. Stylianou testified at trial that plaintiff entered Three Stars Pizza that night upset and claiming that she had been "struck by a truck." (D.I. 54 at 17) Ms. Stylianou also testified that she saw a "mail van" come up Forest Avenue and turn right onto Kirkwood Highway. (D.I. 54 at 21)

Although plaintiff stayed and worked the evening of February 16, 1999, Ms. Stylianou testified that plaintiff's ability to do her job subsequently "dwindled" due to pain in her right shoulder.

(D.I. 54 at 18)

b. The testimony of Isaiah Boyer, Jr., the manager of customer service at the Lancaster Avenue mail station of the USPS, where Ms. Lank worked. Mr. Boyer testified that on February 18, 1999, he spoke with plaintiff. Plaintiff complained that she had been hit by the bumper and side mirror of a USPS van. In response to Mr. Boyer's inquiry as to why she had not called earlier, plaintiff explained that a knot appeared on her shoulder on February 18, 1999. (D.I. 54 at 30) Mr. Boyer thereafter determined that Ms. Lank was the only postal carrier who was in the area where the incident described by plaintiff allegedly occurred. When Mr. Boyer confronted Ms. Lank with this information, she denied striking a pedestrian. (D.I. 54 at 29) Ms. Lank had a reputation for truthfulness at her place of employment. (D.I. 54 at 29)

c. The testimony of Dr. Kelman, a chiropractor licensed in Delaware who first examined plaintiff on March 16, 1999. Upon his initial examination, Dr. Kelman noted "paraspinal muscle spasms" in the cervical and upper thoracic spine. Dr. Kelman diagnosed plaintiff as having "cervical radicular pain" and pain in her right shoulder, either a sprain or strain. Dr.

Kelman opined that his diagnosis was consistent with the history that plaintiff related concerning the February 16, 1999 incident. (D.I. 54 at 4-6)

d. The testimony of Dr. Frank Falco, a local physiatrist. Dr. Falco first saw plaintiff on March 16, 1999. Plaintiff related that she had been hit by a mail van and was suffering pain in the neck, right shoulder and right arm. (D.I. 54 at 117) During his initial examination, Dr. Falco noted that plaintiff had a "contusion injury to the anterior right shoulder with possible rotator cuff involvement." (D.I. 54 at 123) Dr. Falco conceded at trial that a rotator cuff injury is more commonly caused by overuse phenomenon rather than a single trauma. (D.I. 54 at 119, 121) He also acknowledged that plaintiff had reported that using the "slicer all day" made her pain worse." (D.I. 54 at 120) Although Dr. Falco did not know anything about the force of the injury that plaintiff claimed, he opined that plaintiff's injury was caused by the direct trauma she reported. (D.I. 54 at 121)

e. The testimony of Dr. Evan Crain, who initially saw plaintiff in June 2002. Dr. Crain opined that, as of 2002, plaintiff had both a rotator cuff impingement or tendinitis, and acromioclavicular (AC) pathology in her right shoulder. (D.I. 54 at 92, 95) Dr. Crain conceded at trial that the most common cause of an AC joint injury is a blow down onto the top of the

shoulder, not the front. (D.I. 54 at 95, 116) Nevertheless, in the case at bar, Dr. Crain opined that plaintiff's "symptomatic painful AC joint was caused by a blow to the front part of the upper part of her arm . . . because of the history [she] provided." (D.I. 54 at 96) Dr. Crain performed surgery in September 2002. (D.I. 54 at 101) The surgery performed, however, has not been entirely curative, as plaintiff testified that she remains "totally aware of her shoulder all the time" and she continues to have shoulder pain. (D.I. 54 at 50, 52)

8. Both the physical and the medical evidence are inconsistent with plaintiff's version of the facts.

a. The side mirror of the USPS van is only 48.5 inches from ground level. If plaintiff were standing in the street, such a mirror would strike her no higher than mid-way between her elbow and her shoulder. It would have struck even lower on her arm had plaintiff been stepping up onto the curb. All of the medical experts agreed that the above mechanism is not the typical cause of the injuries claimed by plaintiff.

b. It was so dark that evening that neither plaintiff nor Ms. Lank could properly describe the other, rather remarkable if plaintiff was so close to the van that its side mirror struck her. The only identifying mark of record on the USPS van was an abstract logo. Plaintiff most often described the USPS vehicle as a "truck." Even according to plaintiff's version of the

incident, the vehicle was coming toward her from a parked position and going slowly enough for her to feel the side of the van before impact with the mirror. Again, the force described by plaintiff is inconsistent with the events she describes and the injuries she claims.

c. Dr. Bernstein, defendant's medical expert, opined that rotator cuff tendons get injured by tension, not from compression. With that in mind, Dr. Bernstein noted that rotator cuff impingement is almost invariably a result of overuse rather than acute trauma. Dr. Bernstein also testified that the most likely cause of the impingement in this case was the fact that plaintiff worked using a slicer for several hours a day; he referred to this mechanism of injury as "overuse in the context of subtle aging." (D.I. 54 at 18, 21, 104, 157, 171) In contrast, Dr. Crain did not even know plaintiff used a slicer several hours a day. (D.I. 54 at 105) Dr. Bernstein also noted that AC pathology would be visible on an MRI; the MRI performed on plaintiff in December 2001 reported that the shoulder was within normal limits. (D.I. 54 at 152) Finally, Dr. Bernstein testified that AC pain gets better with time, not worse, and that the surgery performed by Dr. Crain should have been entirely curative if plaintiff were suffering from an AC joint injury. (D.I. 54 at 158-161) In summary, Dr. Bernstein opined that plaintiff never had the AC pathology diagnosed by Dr. Crain and

that the mechanism of injury described by plaintiff in the alleged accident - a blow to the front of the shoulder - could not have caused an AC injury. (D.I. 54 at 159)

### **III. CONCLUSIONS OF LAW**

9. It is plaintiff's burden to prove by a preponderance of the evidence that defendant's conduct caused the accident claimed by plaintiff. It likewise is plaintiff's burden to prove by a preponderance of the evidence that the injuries she claims are causally related to defendant's alleged conduct.

10. Although plaintiff's burden is not a heavy one, the court concludes that plaintiff has not proven by a preponderance of the evidence that she was struck in any fashion by the USPS van driven by Tammy Lank on February 16, 1999 or that Ms. Lank, defendant's employee, was negligent in any way. Moreover, the court concludes that plaintiff has not proven by a preponderance of the evidence that the injuries she claims were proximately caused by any conduct related to the defendant. Therefore, judgment shall be entered in favor of defendant and against plaintiff. An appropriate order shall issue.

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 Defendant. )

**O R D E R**

At Wilmington this 31<sup>st</sup> day of March, 2004, consistent  
with the opinion issued this same day;

IT IS ORDERED that the Clerk of Court shall enter  
judgment in favor of defendant and against plaintiff.

Sue L. Robinson  
United States District Judge