IP 03-1598-C T/K Brumfiel v USA
Judge John D. Tinder Signed on 10/25/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JERRY BRUMFIEL,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:03-cv-01598-JDT-TAB
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

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SOUTHERN DISTRICT OF INDIANA
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JERRY BRUMFIEL,	)	
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	)	
Defendant.	)	
	)	

ENTRY FOLLOWING BENCH TRIAL[1]

These are the findings and conclusions in this case contemplated by Federal Rule of Civil Procedure 52(a). Any finding of fact more appropriately considered a conclusion of law shall be so deemed, and vice versa.

I. FINDINGS OF FACT

This case is a claim brought under the Federal Torts Claim Act. The Plaintiff alleges that the Defendant, through the fault of a temporary rural postal carrier, Joene Johnson, proximately caused a collision between his automobile and a vehicle being used in the delivery of a mail route, thereby causing injuries and other damages to him.

[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

A. The Scene

The collision in question occurred at about 2:00 P.M. on July 28, 2001. The weather on that day was sunny and clear. The pavement where the collision occurred was dry. The collision occurred along Division Road, not far from the location where Main Street intersects with Division in Tipton, Indiana, which is in Tipton County. The intersection of Main and Division is a "T" intersection. Division Road is a two-lane blacktop county road that runs in the east-west direction. Main Street is a similar roadway that runs north and south and dead ends where it intersects with Division.

A stop sign at the "T" intersection for Main Street requires traffic turning from Main Street onto Division Road to stop prior to the turn. Traffic traveling along Division Road has the right of way over traffic turning from Main Street onto Division Road. Both Main and Division are straight roads near their intersection, and drivers traveling on both roadways should have a clear view of traffic on the respective intersecting roadways. There were no passengers in either vehicle, and there were no eyewitnesses to the collision, other than the drivers of the respective cars.

B. The Drivers

The Plaintiff, Jerry Brumfiel, was forty-four years of age at the time of trial in this case and was approximately forty years of age at the time of the collision. His principal occupation, both before and after the accident, is as a union carpenter. He also has an interest in the real estate business. At the time of the collision Mr. Brumfiel was

traveling to Indianapolis from his home in Tipton County to attend a real estate seminar being offered at the Omni Hotel in Indianapolis. He was driving a bright red 1990 Ford Probe at the time. Prior to the collision, Mr. Brumfiel had passed through the intersection of Main and Division many, many times, perhaps thousands of times. Traveling through that area was something he did on a routine, perhaps even daily, basis.

Joene Johnson was first employed by the Postal Service in October 2000. She was a temporary rural carrier from the time of her employment through the time of the collision. Part of the testing that she was required to pass in order to obtain her employment was a driving test which included an obstacle course. She also traveled through the area of Main and Division in Tipton on a regular, if not daily, basis.

Her Postal Service work began on July 28, 2001, at approximately 7:30 A.M. As Ms. Johnson prepared for her route that day, she organized her mail so that it was placed in her vehicle in the order in which she intended to deliver it. As was her routine, she put the tubs of mail either in the backseat of her automobile or in the trunk depending on the volume, and then she would put other mail to the right and left sides of her in the front seat of the car. In order to drive her vehicle, she straddled the middle of the front seat. She indicated that she operates the gas and brake pedals with her left foot while her right foot is on the passenger side well of the front seat. From the middle of the seat, she would be able to reach the rural mailboxes from the right side of her car. She claimed to be able to see both her left and right side mirrors as well as the rearview mirror from the middle position of the front seat of her vehicle.

Ms. Johnson began driving her mail route that day at about 10:00 A.M. She was driving her silver Plymouth Neon at the time of the collision. The vehicle did not bear any markings to designate it as a vehicle being used for postal deliveries; however, it was equipped with a yellow safety light on the roof of the vehicle. Ms. Johnson contends that she performed various safety checks on the vehicle before she started her route that day. She claims that she tested the horn, headlights, hazard lights, turn signals, and the yellow safety flashing light on the top of the vehicle. She also claims that it is her practice to use her hazard lights and the flashing safety light at all times when she is delivering mail and that those lights were on at the time of the collision. She also indicated that she had checked both her turn signals and her flasher signals on the morning of the collision, but did not check to see whether they would both operate at the same time.[2] She claims that she could hear the yellow flashing light on her roof whirring as she was making deliveries that day. She was nearing the end of her route when she arrived at the intersection of Main and Division. In fact, she was about to make her last delivery of the day when the collision occurred. That final delivery was to be at the Sisters of St. Joseph's Academy which is located on the north side of Division Road a couple of hundred feet east of the intersection of Main and Division.

[2] Some time after the collision, Mr. Brumfiel performed a test on a model Neon very similar to the one driven by Ms. Johnson during which he turned on both the hazard flashers and the left turn signal at the same time. During that test, he was able to see only the hazard flashers, not the turn signal.

C. The Collision

The respective versions of the events which resulted in the collision are in agreement with regard to the general location of the vehicles, but differ greatly with regard to what the drivers say they did.

According to Ms. Johnson, she drove her vehicle north on Main Street to the intersection with Division Road where she stopped at the point indicated by the stop sign. She says that she looked both ways, saw no vehicles coming, and then turned to the right, heading her vehicle toward the east. She says she drove a couple of hundred feet and then turned left into the Sisters of St. Joseph Academy and, as she turned into the driveway of that institution, her vehicle was struck by Mr. Brumfiel's. She estimated that she had been traveling about ten to fifteen miles an hour from the beginning of the turn onto Division Street until her turn into St. Joseph's. At the time she was turning into St. Joseph's she contends that she was going approximately five miles an hour.

She also indicated that at the intersection of Main and Division nothing obstructed her view to the left or west on Division Road and she could see a substantial distance down that road. She repeated that she did not see Mr. Brumfiel's bright red car coming toward her when she looked in that direction prior to her turn. She also indicated that she looked either in one of her side or rearview mirrors as she was proceeding toward the St. Joseph Academy and saw no vehicle coming up behind her. She did not recall seeing any oncoming traffic headed westbound on Division Road before she made the turn into the St. Joseph Academy. It is interesting to note that Ms.

Johnson did not testify that she signaled her left turn into the Sisters of St. Joseph Academy. Ms. Johnson viewed the accident scene after the collision and observed skidmarks longer than six feet which she attributed to Mr. Brumfiel hitting the brakes prior to the collision.

Mr. Brumfiel has a different, but more credible, memory of some of the critical events leading up to the collision. As he was traveling eastbound on Division Road near Main Street he indicated that he was traveling at least at the speed limit of 55 mph. He indicated that because of the houses in that vicinity, he usually drives at the speed limit but not faster. He first noticed Ms. Johnson's vehicle when it was stopped at the Main Street stop sign before turning onto Division Road. He was approximately 300 feet from that intersection at that time. As he got closer to Main Street the Johnson vehicle pulled out in front of him, also heading in the eastbound direction. The driver appeared to be looking to her right, and he did not see her turn her face and look toward him as he approached the intersection. He noticed that the vehicle had its flashers on, and he thus assumed it was a slow-moving vehicle. He did not notice any other lights on the vehicle at that time.

Mr. Brumfiel was then confronted with the choice of either slamming on his brakes and hoping to avoid hitting the back of the Johnson vehicle or passing it on the left side. He let off of the accelerator briefly as he was viewing the westbound lane, and he had a clear view that there was no westbound traffic in the other lane of Division Road coming in his direction for the entire half mile or so to Highway 19. He then made the choice of attempting to pass the Johnson vehicle on the left by entering the

westbound lane. As he began passing, the Johnson vehicle suddenly turned left in front of him and the collision was unavoidable. He saw no left turn signal prior to the Johnson vehicle's turn. As the impact occurred, Mr. Brumfiel applied his brakes. He conceded that he was traveling perhaps 55 or 60 miles per hour ("mph") and that the speed limit along Division Road at that location is 55 mph. He insisted that he was not traveling 70 or 80 mph, and there is no credible evidence that he was traveling that fast. He began crossing into the left lane of Division to get around Ms. Johnson's car as he passed Main Street. He got completely into the left lane well after Main Street.

Prior to the collision, Mr. Brumfiel saw the yellow light on top of the Johnson vehicle, but it was not operating. Mr. Brumfiel did not sound his horn because there was no time to do so before the collision. He indicated that approximately 30 feet west of the intersection of Division and Main, Division Road has yellow line markings indicating no passing. Those lines end at Main Street. During the collision the right front corner of Mr. Brumfiel's car hit the driver's side door of Ms. Johnson's vehicle. The vehicles then came to rest in front of the Sisters of St. Joseph Academy.

D. Damage to the Vehicles

The principal damage to Mr. Brumfiel's Ford Probe is to the passenger side front of the vehicle. The vehicle sustained substantial damage to the passenger side fender and the hood appears to be bent. Mr. Brumfiel had owned that vehicle for approximately one year and had paid approximately $1,000 for it. The vehicle had approximately 91,000 miles on it when he purchased it, and had some mechanical

problems. Mr. Brumfiel made the repairs on it and estimated that the vehicle's value was between $2,000 and $2,500 dollars at the time of the collision. The damage to the vehicle resulting from the collision has never been repaired. Mr. Brumfiel has not repaired it and does not intend to repair it. Nor has he attempted to sell it. It is most likely that he will use the vehicle for spare parts. According to Mr. Brumfiel, the engine, transmission, interior and rear end of the vehicle are still in good condition and could be used for parts. He estimates that he could receive five or six hundred dollars for the engine and transmission. There also appears to be some damage to the passenger side front wheel and tire. Mr. Brumfiel estimates that it would cost between forty and fifty dollars to have the Probe hauled to a junkyard. The bill for towing the Probe from the scene of the accident to Mr. Brumfiel's home was $130.

Ms. Johnson's vehicle was a total loss as a result of the accident, and, unfortunately, was not covered by her auto insurance because of an exclusion in the policy regarding use of the vehicle for employment purposes. Because of the debt owed on the vehicle and its loss, Ms. Johnson and her husband filed bankruptcy after the collision.

E. Injuries to the Plaintiff

Mr. Brumfiel was taken to the Tipton County Memorial Hospital where he received emergency room treatment. He also visited his family doctor, Michael Harper, M.D., and attempted physical therapy for an injury to his shoulder which occurred during the collision. Plaintiff's Exhibit 5 is a timeline of the medical treatment Mr. Brumfiel

received following his involvement in this collision. The medical records are contained in Plaintiff's Exhibit 4 and the bills for these medical treatments are contained in Plaintiff's Exhibit 6.

With regard to Mr. Brumfiel's injuries, his initial treatments through the Tipton County Memorial Hospital and with his personal physician Dr. Harper were conservative. He had pain in the upper back, in his neck, and in his left clavicle area. Initially he had a small abrasion on his right lower leg below the knee and some pain in the back of the head. The x-rays taken at the hospital were negative for any fractures. His diagnosis upon leaving the hospital was that he suffered a head contusion, had a neck and shoulder sprain, and an abrasion and a contusion to his right leg. He was released from the hospital on the same date as the accident. He saw his personal physician two days later. He indicated to his physician that he wanted to return to work, although his upper back and shoulder pain continued. He continued to have problems in those areas despite physical therapy and other conservative treatments.

As Mr. Brumfiel's condition had not substantially improved as of June 2002, his physician referred him to the Methodist Sports Medicine Clinic for orthopedic consultation. He was treated there by Dr. Gary Misamore. Ultimately, Dr. Misamore performed shoulder surgery on October 10, 2002, on Mr. Brumfiel to repair damage to the shoulder. Mr. Brumfiel was a compliant patient and performed the rehabilitation work that was prescribed for him. He was released to full work without limitation and full activities as of January 24, 2003. Even after recovery from the surgery, Mr. Brumfiel still experiences that he can only bend more slowly and he cannot twist his left shoulder

and arm to the same extent that he could before the collision. He is unable to reach behind his back to put his belt through his pant loops with his left hand. Although he was released to work as of January 24, 2003, he could actually only do light work. He was able to find light work through February 21, 2003. However, from February 22 to April 23, 2003, he was out of work because the light work that he was doing had ended, and he could not find other work that he could perform until April 24, 2003.

At the end of July 2003, Mr. Brumfiel visited with Dr. Misamore again to discuss popping or squeaking that he was having in his left shoulder. That does happen to him occasionally and he still has the continuing problems previously mentioned. Although his surgeon concludes that he had excellent results from the surgery, Mr. Brumfiel still has the continuing limitations and complaints previously mentioned. The record regarding the July 30, 2003, examination by Dr. Misamore indicates that Mr. Brumfiel told Dr. Misamore that his shoulder had been getting steadily better and that he was essentially symptom-free and back doing all of this activities, including rigorous work. About a month prior to that visit Mr. Brumfiel had experienced a popping in his shoulder when he was picking up and moving concrete blocks. He also noticed some squeaking in the shoulder after that event. He indicated that this lasted for a couple of weeks, then seemed to have resolved itself, and in the last several weeks his shoulder had been feeling much better and was no longer squeaking. He still felt, though, that he may have a small loss of power in the shoulder after that event, but felt that, too, seemed to be resolving. The physical examination of his shoulder showed a slight tenderness with relatively good motion and no impingement sign or painful arc. He appeared to have

good strength and was able to conduct manual testing without pain. The surgeon indicated that the squeaking might have been the result of retained sutures which could be removed if necessary. No further follow-up was done after that visit.

F. Expenses Related to Medical Treatments

Mr. Brumfiel's total medical bills for treatments received as a result of the collision were $35,380.22.

G. Continuing Limitations

Now, even several years after the shoulder surgery, Mr. Brumfiel indicates that occasionally when he uses his arm for more than a couple of hours it will start to get weaker and sometimes his hand around the thumb area will go numb using a circular saw. He will then rest his arm and hand and later return to work. He feels that he is not one hundred percent well and that he will not improve further. He also feels based on what Dr. Misamore told him that he is more likely to have bursitis or arthritis, though he has not been diagnosed with either as of this point.

In addition to those limitations, Mr. Brumfiel no longer is able to play sports. His daughter is active in softball and he used to throw and play catch with her. He can no longer do those things as well as he used to. He also is not as able to swim with her and play with her while swimming. His daughter is eleven years of age. He is also unable to pick her up with his left arm. Mr. Brumfiel also finds that he is not able to sleep a full night and often can only sleep about four hours at a time. He also contends

that he has difficulty during sexual relations because he is unable to adequately support himself. Mr. Brumfiel feels that he can no longer perform the full range of his carpentry duties. He is unable to climb walls and wear a harness to hang off of large walls called gang walls to pour concrete, and he is unable to carry around the forms. He can only do lighter work, which is not always available to a carpenter.

H. Income Loss

Mr. Brumfiel submitted evidence regarding his loss of income. In 1999 he earned approximately $34,500. In the year 2000 his income was slightly over $46,000. In 2001 his income was slightly under $34,000. In the year 2002 Mr. Brumfiel's income was approximately $33,000. In 2003 he earned $43,647, and in 2004 he earned approximately $54,000. He worked as a foreman both before and after the accident. His wages have increased slightly because of improved contract wages.

The insurance lien on the medical bills paid is $15,499.60. Mr. Brumfiel was released to return to work on October 18, 2002, approximately one week after the surgery. He testified that he was released only to light duty one-handed work and that there is not much one-handed work for a carpenter to do. Mr. Brumfiel's summary of his lost wages claim is contained in Plaintiff's Exhibit 7. He contends that he was earning approximately $825 per week prior to the surgery. He was off from October 10, 2002 through February 4, 2003, losing a total of sixteen weeks. He returned to work on February 5 and worked through February 21 of 2003. He was off again for eight weeks

from February 22, 2003 through April 23, 2003. It is not uncommon in the carpentry business to be laid off for several months of each year.

Mr. Brumfiel contends he should receive $19,800 for the twenty-four weeks he was off work related to the surgery.

I. Pain and Suffering

Mr. Brumfiel gave some testimony about the pain and suffering he experienced during and after the collision and that continues to this day, but no estimate of the value of that aspect of damages was made. The nature of the continuing pain and suffering is described in the preceding discussion of continuing limitations.

II. CONCLUSIONS OF LAW (INCLUDING MIXED QUESTIONS OF FACT AND LAW)

Mr. Brumfiel is bringing his negligence action under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, which provides a remedy for personal injury caused by the negligent or wrongful act of any government employee acting within the scope of his employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place" where the act occurred. 28 U.S.C. § 1346(b)(1); *see also Spurgin-Dienst v. United States*, 359 F.3d 451, 455 n.2 (7th Cir. 2004). As the alleged harm occurred in the State of Indiana, Indiana substantive law will be applied in the instant case. *Id*.

A. Liability

To recover under a theory of negligence under Indiana law, a plaintiff must establish three elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty by the defendant; and (3) that the breach proximately caused the plaintiff's damages. *Sizemore v. Templeton Oil Co.*, 724 N.E.2d 647, 650 (Ind. Ct. App. 2000). Whether a defendant owes a duty of care to a plaintiff is generally a question of law for the court to decide. *Estate of Cullop v. State*, 821 N.E.2d 403, 407 (Ind. Ct. App. 2005). Nevertheless, whether a particular act or omission is a breach of duty is generally a question for the finder of fact. *Id*.

A motorist owes a duty of care to other motorists while driving. More specifically, a motorist has a duty to use due care to avoid a collision and to maintain his automobile under reasonable control. *Chaney v. Tingley*, 366 N.E.2d 707, 710 (Ind. App. 1977). A motorist must maintain a proper lookout while operating a motor vehicle as a reasonably prudent person would do in the same or similar circumstances. *See Brock v. Walton*, 456 N.E.2d 1087, 1091 (Ind. Ct. App. 1983). The duty to keep a lookout is imposed upon a motorist so that he may become aware of dangerous situations and conditions to enable him to take appropriate precautionary measures to avoid injury. *Schultz v. Hodus,* 535 N.E.2d 1235, 1238 (Ind. Ct. App. 1989), *trans. denied*.

Furthermore, a motorist has a duty to follow Indiana traffic regulations. Relevant to this case are Indiana Code § 9-21-8-31(a), which states that "[a] person who drives a vehicle shall do the following . . . [y]ield the right-of-way to other vehicles that have

entered the intersection from the through highway or that are approaching so closely on the through highway as to constitute an immediate hazard," as well as Indiana Code § 9-21-8-25, which states:

> [a] signal of intention to turn right or left shall be given continuously during not less than the last two hundred (200) feet traveled by a vehicle before turning or changing lanes. A vehicle traveling in a speed zone of at least fifty (50) miles per hour shall give a signal continuously for not less than the last three hundred (300) feet traveled by the vehicle before turning or changing lanes.

According to the findings of fact in this case, the Defendant's employee Ms. Johnson, acting within the scope of her employment, breached her duty of care to Mr. Brumfiel under the above authority, the results of which proximately caused injury to him. Ms. Johnson failed to keep a proper look-out on two occasions: first, when she turned from Main onto Division and failed to notice Mr. Brumfiel's vehicle; and second, when she did not notice his vehicle before she made her left turn from Division into the driveway of the Sisters of St. Joseph Academy. Ms. Johnson violated both traffic regulations noted above when she did not yield the right-of-way to Mr. Brumfiel at the intersection of Main and Division, and then, according to the preponderance of the evidence, when she failed to use her turn signal before she began her left turn in the Sisters of St. Joseph Academy driveway. However, even if Ms. Johnson had used her turn signal, the test that Mr. Brumfiel performed on the signal lights of a similar Neon suggests that the turn signal would not have been visible to him because the hazard lights override turn signals on Neon vehicles. Finally, in neglecting to keep a proper

look-out, yield the right-of-way, and use a visible turn signal, Ms. Johnson failed to keep reasonable control of her vehicle and to avoid a collision.

Although Ms. Johnson breached her duty of care to Mr. Brumfiel, and was the proximate cause of his injury, any damages thus owed to Mr. Brumfiel are reduced according to the percentage of his own fault, if any, under Indiana's Comparative Fault Act. Ind. Code § 34-51-2-5; *Kmart Corp. v. Englebright*, 719 N.E.2d 1249, 1260 (Ind. Ct. App. 1999). Indiana's Comparative Fault Act "reflects a legislative determination that fairness can be best achieved by a relative assessment of the parties' respective conduct." *Id*. (citation omitted). It's primary objective "was to abrogate the harshness of the common law rule of contributory negligence under which even a slightly negligent plaintiff was precluded from recovery." *Koziol v. Vojvoda*, 662 N.E.2d 985, 988 (Ind. Ct. App. 1996). "Allocation of each party's proportionate fault is a question for the trier of fact . . . except where there is no dispute in the evidence and the fact finder could come to only one conclusion." *Walters v. Dean*, 497 N.E.2d 247, 254 (Ind. Ct. App.1986).

The Defendant claims that the Plaintiff was at least partially at fault because he violated several rules of the road. Namely, the Defendant claims that the Plaintiff violated Indiana Code §§ 9-21-8-8(b)(2), 9-21-4-13, 9-21-5-1, and 9-21-7-11(5).[3] In

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[3] Indiana Code § 9-21-8-8(b)(2) provides: "A vehicle may not be driven to the left side of the roadway under the following conditions: . . . [w]hen approaching within one hundred (100) feet of or traversing an intersection[.]" Indiana Code § 9-21-4-13 provides:

> A local unit that has responsibility for roads and streets may determine by an engineering and traffic investigation those parts of a road or street, including bridges, under the unit's jurisdiction where overtaking and passing or driving to

(continued...)

short, the Defendant contends that within the context of the flashing lights on Ms. Johnson's rural postal vehicle, Mr. Brumfiel should have taken extra care and somehow inferred that it was a delivery vehicle that would be likely to turn left. The Defendant argues that instead of exercising due care, Mr. Brumfiel drove excessively fast and illegally passed while in an intersection and double yellow stripe zone.[4] In light of these asserted violations, the Defendant claims that its fault should be reduced accordingly.

While Mr. Brumfiel may have attempted to pass Ms. Johnson in a no-passing zone, that decision was the lesser of two risky and dangerous options. He was faced with a Hobson's choice because of Ms. Johnson's negligence. When Ms. Johnson abruptly pulled out in front of Mr. Brumfiel, his only choices were to either pass on the left, or brake sharply and rear-end her. By choosing to pass instead of brake, Mr. Brumfiel, with the knowledge that he possessed at that time, made the most reasonable

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[3](...continued)
the left of the roadway would be especially hazardous. Upon making that determination, the local unit may, by ordinance, designate no-passing zones by appropriate signs or marks on the roadway.

Indiana Code § 9-21-5-1 provides:

> A person may not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing. Speed shall be restricted as necessary to avoid colliding with a person, vehicle, or other conveyance on, near, or entering a highway in compliance with legal requirements and with the duty of all persons to use due care.

Indiana Code § 9-21-7-11(5) provides: "[f]lashing lights may be displayed on a vehicle as follows: . . . [a]s a means of indicating the presence of a vehicular traffic hazard requiring unusual care in approaching, overtaking, or passing."

[4] The only intersection at issue here is the intersection of Main and Division. The turning area in front of the Sisters of St. Joseph Academy driveway does not constitute an intersection under Indiana law.

decision available to him. If he had had notice that Ms. Johnson was going to turn left into his passing lane, his decision may not have been the same. The resulting collision is solely the product of Ms. Johnson's omissions and the decision she forced Mr. Brumfiel to make. The court concludes that Mr. Brumfiel's speed was not excessive, and he did what any reasonably prudent driver would have done if confronted by the sudden and unexpected hazard posed by Ms. Johnson's careless driving. The court concludes that there is no fault on Mr. Brumfiel's part to compare with Ms. Johnson's negligence, so Mr. Brumfiel is entitled to recover all of his damages caused by that negligence. Those damages will be discussed in the following section.

B. Damages

Ms. Johnson's negligence caused damage to Mr. Brumfiel in the four respects: medical expenses, property damage, lost wages, and pain and suffering (both past and future).

1. Medical Expenses

One injured by the negligence of another is entitled to "reasonable compensation," which "means such sum as would reasonably compensate the victim both for bodily injuries and for pain and suffering." *Ritter v. Stanton*, 745 N.E.2d 828, 843 (Ind. Ct. App. 2001). "To that sum is added past, present, and future expenses reasonably necessary to the plaintiff's treatment[.]" *Id*.

Applicable also to the damages calculation in this case is Indiana's collateral source statute. Ind. Code § 34-44-1-1 *et seq*. Formerly, under the common law, "[t]his rule held tortfeasors fully accountable for the consequences of their conduct regardless of any aid or compensation acquired by plaintiffs through first-party insurance, employment agreements, or gratuitous assistance." *Shirley v. Russell*, 663 N.E.2d 532, 534 (Ind. 1996). "[A]mong the most central principles upon which the common law rule was built is that collateral source payments resulting from the victim's own "prudence and foresight" should not offset a damage award." *Id*. However, "the purpose of the new collateral source rule statute is to determine the *actual* amount of the prevailing party's pecuniary loss and to preclude that party from recovering more than once from all applicable sources for each item of loss sustained in a personal injury or wrongful death action." *Id.* at 534-535 (emphasis added). The collateral source statute, in effect, dictates what types of collateral source payments will be admitted as evidence.

The Indiana collateral source statute provides for several exceptions, one of which includes the exclusion of insurance benefits for which the plaintiff or members of the plaintiff's family have paid directly.[5] The Plaintiff here argues that this exception should apply to insurance payments and agreements for write-offs by his medical providers that were made or reached by the insurance company retained by his carpentry union. He argues that his labor as a carpenter paid directly for these benefits,

[5] Indiana's collateral source statute provides in pertinent part that: "[i]n a personal injury . . . action, the court shall allow the admission into evidence of: proof of collateral source payments other than . . . insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly." Ind. Code § 34-44-1-2.

and that they therefore should be excluded as evidence in calculating the measure of his damages. In short, Mr. Brumfiel is asking for damages that equal the amount of his medical bills, not what he is actually obligated to pay. To support his argument, he relies on *Shirley v. Russell*, where the court held that a retired teacher's survivor benefit that was deducted from his monthly pension payment must be excepted from the collateral source statute because the teacher paid for the benefit directly. *Shirley*, 663 N.E.2d at 534-36.[6]

Shirley is not on point with the facts in this case. Here, the evidence of collateral payment Mr. Brumfiel is attempting to exclude is from the medical insurance his carpentry union provided him. Unlike the payments at issue in *Shirley*, these were not pension payments, nor were they directly deducted from Mr. Brumfiel's take-home pay. Moreover, there is no precedent from Indiana supporting labor as an equivalent of a direct payment in the context of the collateral source statute. Mr. Brumfiel's further contention that he should receive the billed amount of his medical expenses instead of the reduced amount he is obligated to pay goes against the purpose of the collateral source statute, even though the written-off amount is technically not a collateral source "payment."

[6] Mr. Brumfiel also cites *Arthur v. Catour*, 803 N.E.2d 647 (Ill. App. 2004), *aff'd*, 833 N.E.2d 847 (2005) and *Bynum v. Magno*, 101 P.3d 1149 (Haw. 2004) to support his notion that damages should be measured by the billed amount, not by what is actually owed. Neither *Arthur* nor *Bynum* applies here, however. Illinois and Hawaii have no analogous collateral source statute. Instead, these states follow the opposing common law rule.

As noted above, the collateral source statute purports to limit double-recoveries and windfalls on the part of plaintiffs. Other states with statutes abrogating or replacing the common law rule have, in the context of Medicare and Medicaid payments, likewise "allow[ed] an injured party to receive compensation for medical expenses for which they have become liable, but [have not permitted] the plaintiff to receive a windfall by recovering 'phantom damages.'" *Coop. Leasing, Inc. v. Johnson,* 872 So.2d 956, 959 (Fla. Dist. Ct. App. 2004), *review dismissed*, 905 So.2d 76 (Fla. 2005); *see also Dyet v. McKinley*, 81 P.3d 1236, 1239 (Id. 2003); *Kastick v. U-Haul Co.*, 740 N.Y.S.2d 167, 169 (N.Y. App. Div. 2002) (holding hospital's write-off of medical bills not recoverable as damages). Even a state following the common law rule came to a similar conclusion regarding written-off Medicare expenses, stating that a "[p]laintiff will not be permitted to recover any write-off however, unless she can establish personal liability, at some time, for that amount." *McAmis v. Wallace*, 980 F. Supp. 181, 185 (W.D. Va. 1997). Therefore, Mr. Brumfiel may not exclude from evidence payments and/or agreements his insurance company made with medical providers that lowered the amount that he actually owes for his medical expenses. (*See* Indiana Carpenters Welfare Fund lien, Def.'s Ex. E.) Because Mr. Brumfiel has presented no evidence that he was personally liable for the written-off amounts, or that they represent any actual pecuniary loss to him, he may not recover damages for these amounts. *See, e.g.*, *Dyet*, 81 P.3d at 1239 (holding medicare write-offs are not an item of damages for which a plaintiff may recover where plaintiff incurred no liability for write-offs). Thus, the court concludes that Mr. Brumfiel should recover only the amount paid for his medical treatment, specifically, $15,499.60.

2. Property Damage

During cross-examination at trial, Mr. Brumfiel stated that he estimated that the engine and transmission of the Ford Probe were worth approximately five or six hundred dollars. He went on to say in re-direct, however, that he had not attempted to sell the vehicle, nor any of its parts. The court concludes that the vehicle was worth $2,500 before the collision and is now worth, at best, $600. The Plaintiff has submitted a bill for the costs of towing his vehicle from the accident site, $130. (Pl.'s Ex. 8.) Consequently, the portion of the damage awarded for this property loss is $2,030.

3. Lost Wages

Mr. Brumfiel submitted a lost wages claim for the weeks after his October 10, 2003, surgery, (Pl.'s Ex. 7); he is requesting wages for the period between that date and April 23, 2003, excepting two weeks in February for when he was performing indoor carpentry. *(Id*.) To arrive at his estimate, Mr. Brumfiel calculated his weekly average salary for 2002 up until his surgery using his total wages so far for that year.

The Plaintiff contends that due to his shoulder surgery, while he was released to perform light work, he could not find steady work as a union carpenter because he could not perform the full range of activities required of that position. However, on cross-examination, he testified that his work as a carpenter is often seasonal, and that he has had intermittent work during the winter months in previous years. Additionally, Mr. Brumfiel's calculations as to weekly wages claimed are based upon several carpentry

jobs he completed during the year before his surgery, but do not reflect a steady weekly salary. Even though the Plaintiff had been employed the year previous to his surgery, this former employment was not a guarantee that he would receive continuing employment over the winter months. The Defendant further notes that Mr. Brumfiel has earned more money in the years since his injury and surgery than during the year of or previous to his injury. (*See* Pl.'s Ex. N; Def.'s Ex. L.)

However, the record convinces the court that Mr. Brumfiel is a worker who, prior to the accident, worked as frequently as he was able to find work. The court is also convinced by the evidence and reasonable inferences that are drawn from the direct evidence in the record that even after the accident and the surgery, Mr. Brumfiel worked as often and as vigorously as he could. Although his total annual earnings have increased in the years after he was injured by Ms. Johnson's negligence, the court is convinced that his earnings growth is merely a product of overall wage increases in his field, and is not an indication that he did not suffer a temporary wage loss. As for that loss, the court is convinced that Mr. Brumfiel would have worked during the twenty-four weeks after surgery that he was off if he could have found work that could have been done within the restrictions he was under, but no such limited work was available. If he had not been injured, it is likely that he could have found "two-handed" carpenter work to do during those weeks. The fact that he was able to work for the brief two weeks in February is inconsequential. The type of light work he did during those weeks was an exception to the usual situation during that period in which limited work was not usually available. The estimate of $825 per week is a reasonable one, based on his earnings

during the relevant periods of time. Therefore, the court concludes that Mr. Brumfiel should be awarded $19,800 in lost wages, that is, twenty-four weeks at $825 per week.

4. Pain and Suffering

There is no sure formula for assessing pain and suffering damages. The record clearly supports a conclusion that Mr. Brumfiel suffered blunt trauma injuries during this collision which were caused by Mr. Johnson's negligence. The record also supports a conclusion that the shoulder surgery was a necessary consequence of the injuries suffered in the collision. The record further supports the conclusions that Mr. Brumfiel suffered pain and limitations leading up to the surgery, during recovery and rehabilitation, and that he continues to suffer pain and limitations up to the present which show no likelihood of diminishing in the future. While it is hoped that he will live a long and productive life, it is clear that the injuries resulting from this collision have left him a diminished man and, despite legitimate rehabilitation efforts, he is as good as he ever will be. Undoubtedly, a reasonable person would pay a sizeable sum of money to avoid having to endure such suffering. But the world does not work that way, and a retrospective and future award must be made now that the negligently caused damage has occurred. Therefore, the court concludes that the pain and suffering endured by Mr. Brumfiel as a result of the Defendant's vicarious liability is:

> $35,000 for the period of time from the collision until trial; plus
>
> $35,000 for the pain and suffering reasonably likely to be experienced by the Plaintiff in his remaining years of life.

The post-trial pain and limitations that Mr. Brumfiel will experience in the future are not as great as the pain and suffering that he experienced between the time of the collision and the trial. However, the post-trial pain and limitations that Mr. Brumfiel is likely to experience are expected to continue for the rest of his life—a time period of a much longer duration than that between the collision and trial. Thus, the court finds that the dollar amounts for the two different time periods are the same.

III. CONCLUSION

Judgment will be entered for the Plaintiff in the amount of $107,329.00, consisting of:

$15,499.60	Medical Expenses
$ 2,030.00	Property Damage
$19,800.00	Wage Loss
$35,000.00	Past Pain and Suffering
$35,000.00	Future Pain and Suffering

ALL OF WHICH IS ENTERED this 25th day of October 2005.

John Daniel Tinder, Judge
United States District Court

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