

that such an injury cannot be effectively treated orthopedically. Further, he observed what he characterized as mild to moderate arthritis in the area of the injury, and he opined that the injury to plaintiff's right knee was caused by plaintiff's fall into the underground box.

{¶3} One of the major factual disputes surrounding plaintiff's damages is whether the present state of plaintiff's knee injury is attributable to her fall into the valve box in 1996, or to the work-related injury she sustained in 1985 and the degenerative changes caused thereby. In 1985, plaintiff fell and struck her right knee while working as a physical therapist. Plaintiff was seen by Dr. Baron who diagnosed a right patella femoral injury to the patella tendon. Subsequent diagnostic surgery revealed damage to the underside of plaintiff's patella (knee cap). Dr. Baron released plaintiff to return to her work as a physical therapist in August 1985, but she continued to receive treatment for pain through August 26, 1986, when she was released from further treatment. As of the date of trial, Dr. Baron's postoperative report could not be located.

{¶4} Defendant contends that all of plaintiff's current difficulties were caused by the 1985 injury and the subsequent degenerative changes arising therefrom. However, the evidence in this case refutes defendant's contention. Indeed, plaintiff's post-1985 treatment history with Dr. Baron establishes that plaintiff made no complaints about her right knee from the time she was released from treatment in 1986 to the time that she sustained the injury in question in 1996. Plaintiff was treated by Dr. Baron for a wrist injury in the fall of 1986, foot pain in the summer of 1987, neck pain later in 1987, shoulder pain in 1988 and toe pain in 1995. Dr. Baron's records from these post-1985 injuries reveal no complaints from plaintiff about her right knee.

{¶5} Defendant's expert, Dr. Walter Hauser, opined that all of plaintiff's current complaints are attributable to the 1985 knee injury. Dr. Hauser based his opinion on certain assumptions that he made as to the nature and extent of the 1985 injury. Because Dr. Baron's postoperative report could not be located, Dr. Hauser simply assumed that plaintiff sustained a right knee chondral injury in 1985 rather than in 1996, as Dr. Baron stated. Dr. Baron actually performed the 1985 surgery and, in the opinion of the court, had a better basis for his opinion about the injury that plaintiff sustained. Next, Dr. Hauser assumed that plaintiff was out of work for approximately

six months as a result of the 1985 injury. However, Dr. Baron confirmed that plaintiff sustained a neck injury in 1986 which, according to plaintiff, caused her to miss about four months of work. Finally, Dr. Hauser admitted that he could not read some of Dr. Baron's notes.

{¶6} In short, the court finds that Dr. Baron's testimony regarding the nature and extent of plaintiff's 1985 and 1996 injuries to be more credible. The court, however, does find that degenerative changes resulted from the 1985 injury and that those degenerative changes have contributed to plaintiff's current pain and immobility. Indeed, Dr. Baron observed mild to moderate arthritis in the knee when he performed the diagnostic surgery in 1997. Upon review of all the medical evidence submitted, the court finds that plaintiff's award for pain and suffering and loss of enjoyment of life must be reduced by ten percent to account for the damage caused by the 1985 injury.

{¶7} The court further finds that plaintiff will require a complete knee replacement in the near future and that the surgery is attributable to the 1996 injury. The evidence in the record establishes that the knee replacement procedure will cost \$32,272. Plaintiff argues that she will require a second right knee replacement by the age of seventy-four and asks the court to award her an additional sum prospectively. However, the court finds that the testimony regarding the need for a second replacement is speculative; therefore, the court will not award such damages.

{¶8} Defendant also argues that plaintiff's inability to return to work as a physical therapy aide was due to her 1985 injury. The court disagrees. Denise Cervantes and Beverly Trilli worked with plaintiff as physical therapy aides from 1990 through 1996. According to both witnesses, plaintiff never failed to perform any of the duties required of a physical therapy aide including lifting, squatting, demonstrating floor exercises, and demonstrating equipment such as ankle weights and weight-lifting machines. These witnesses each testified about plaintiff's attempt to continue working as a physical therapy aide after her 1996 knee injury. Each witness stated that plaintiff could no longer perform her duties as a physical therapy aide. Specifically, plaintiff could not bend her right knee, she could not demonstrate exercise equipment and she had difficulty walking and climbing

stairs. Both witnesses observed swelling in plaintiff's knee during this period. Plaintiff finally gave up her attempt to work as a physical therapy aide and took a desk job with the company.

{¶9} Based upon the above-cited testimony, the court finds that plaintiff's inability to return to work as a physical therapy aide was caused solely by the injury she sustained in 1996. The degenerative changes caused by plaintiff's prior knee injury did not impact plaintiff's ability to return to work. In valuing plaintiff's wage loss claim, the undisputed evidence in the record establishes that plaintiff missed three hundred twelve hours of work during the relevant time period at a rate of \$10.72 per hour for a total of \$3,344.64. Evidence also establishes that plaintiff was entitled to a \$100 bonus and employer pension contributions of \$100.33.

{¶10} Defendant argues that plaintiff missed some of this work for reasons other than her 1996 knee injury. The court disagrees. Plaintiff testified that she missed approximately two hundred hours of work after the first knee surgery in 1997 and that she missed approximately one hundred ten hours following the second surgical procedure in 2000. Based upon plaintiff's testimony and the records from her employer, the court finds that plaintiff sustained a total wage loss of \$3,544.97.

{¶11} With regard to plaintiff's claim for loss of enjoyment of life and pain and suffering, plaintiff's friends Karen Voyko and Mary Klien testified about plaintiff's level of activity prior to her 1996 knee injury. According to these witnesses, plaintiff was very active prior to the injury. Specifically, plaintiff enjoyed riding and caring for her horses and was involved in the making of stained glass, which requires standing for several hours at a time. Prior to the 1996 injury, plaintiff did not complain of pain and swelling in her knee. Voyko and Klien testified that after the 1996 injury, all of plaintiff's activities were severely curtailed by her knee pain; they also observed plaintiff in pain and having trouble walking without a cane. Both Voyko and Klien noticed a change in plaintiff's disposition after her 1996 injury. According to these witnesses, plaintiff went from being enthusiastic and eager to being sullen and guarded.

{¶12} Plaintiff testified convincingly about her pain and loss of mobility after the 1996 injury. Prior to the injury, plaintiff rode and cared for her horses, made stained glass, performed a majority of the household chores and cared for her elderly father. Plaintiff also participated in such

activities as swimming, diving, snorkeling, power walking, dancing and shopping before the accident. Since the 1996 knee injury, plaintiff experiences moderate to severe pain and swelling in her right knee and walks with the assistance of a cane. Plaintiff testified that the inability to participate in activities that she enjoyed combined with near constant knee pain has affected her mood and has negatively impacted her marriage which ended in divorce in 2001.

{¶13} Based upon the above, the court finds that plaintiff endured pain and suffering and a loss of enjoyment of life as a direct and proximate result of defendant's negligence, and the court values that loss at \$150,000. The court further finds that ten percent of this loss was caused by the degenerative changes associated with plaintiff's 1985 knee injury. Accordingly, this portion of plaintiff's award must be reduced by ten percent.

{¶14} Plaintiff John Tokach asserts a claim of loss of consortium. Tokach testified that after plaintiff's 1996 knee injury, plaintiff was unable to perform household chores and could no longer tend to her father and that he was forced to perform these tasks. Tokach agreed that the injury had an affect on the couple's social and sex life and that their marriage suffered as a result. The couple were separated in February 2000 and divorced in February of 2001. The court finds that John Tokach suffered a loss of consortium from October 1996 through February 2000, which the court values at \$5,000.

{¶15} In the final analysis, the court finds that plaintiff has or will sustain the following damages: 1) \$135,000 for past and future pain and suffering and loss of enjoyment of life; 2) \$32,272 for a future knee replacement surgery; and, 3) \$3,544.97 in lost wages. Plaintiff's total damages of \$170,816.97 must be reduced by forty percent to account for plaintiff's contributory negligence, leaving \$102,490.18 in total damages. Reducing John Tokach's, \$5,000 loss of consortium by forty percent leaves \$3,000.

{¶16} Judgment shall be entered in favor of plaintiff Margaret Tokach in the amount of \$102,490.18 and for John Tokach in the amount of \$3,000.

Case No. 99-06049

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JUDGMENT ENTRY

RUSSELL LEACH
Judge