

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

328

CA 15-01478

PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

SANDRA J. CROISDALE AND LAWRENCE CROISDALE,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ROBERT R. WEED AND LYOLA B. WEED,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

HAGELIN KENT LLC, BUFFALO (SEAN SPENCER OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered April 27, 2015. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Sandra J. Croisdale (plaintiff) and her husband commenced this negligence action seeking damages for injuries she allegedly sustained when the vehicle she was operating was struck by a vehicle owned by defendants and operated by defendant Robert R. Weed. Following discovery, defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), as partly evidenced by a gap in plaintiff's treatment for her left knee, which plaintiffs alleged had been injured in the accident. Supreme Court granted the motion in part, dismissing plaintiffs' claims insofar as they are based on injuries other than to plaintiff's left knee and based on the significant limitation of use, permanent loss of use and significant disfigurement categories of serious injury. The court denied the motion, however, insofar as it sought dismissal of the claim of serious injury to plaintiff's left knee under the permanent consequential limitation of use category. Defendants' appeal from that order is the subject of appeal No. 1. Defendants thereafter moved for leave to renew the motion, contending that the deposition transcript of one of plaintiff's treating physicians constituted new facts not offered on the motion that would change the court's determination, and that the deposition transcript was unavailable

before the motion was filed because plaintiffs' counsel failed to authorize defendants to obtain it. The court denied the motion for leave to renew, concluding that defendants lacked a reasonable justification for not submitting the deposition transcript in support of the summary judgment motion and, in any event, that the deposition transcript would not have changed the court's determination of the motion. Defendants' appeal from that order is the subject of appeal No. 2. We affirm in both appeals.

We conclude that, although defendants contended in support of the motion that plaintiff's left knee injuries were preexisting and the result of a degenerative condition, "they failed to submit evidence establishing as a matter of law that the injuries were entirely [preexisting] . . . and were not exacerbated by the accident in question" (*Benson v Lillie*, 72 AD3d 1619, 1620; see *Linton v Nawaz*, 62 AD3d 434, 439, *affd* 14 NY3d 821; *Schreiber v Krehbiel*, 64 AD3d 1244, 1245). In any event, even assuming, *arguendo*, that defendants met their initial burden, we conclude that plaintiffs raised triable issues of fact in opposition to the motion by submitting medical evidence that the tear in plaintiff's left lateral meniscus was caused by the accident, and that any preexisting condition suffered by plaintiff was aggravated by the accident (see *Roll v Gavitt*, 77 AD3d 1412, 1413). We also conclude that plaintiffs provided a reasonable explanation for plaintiff's failure to seek medical treatment for her injuries in the six months after the accident (see *Cook v Peterson*, 137 AD3d 1594, 1597-1598; *Kellerson v Asis*, 81 AD3d 1437, 1438; see generally *Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906-907).

Finally, we conclude that the court properly denied defendants' motion for leave to renew. It is well settled that "[a] motion for leave to renew 'shall be based upon new facts not offered on the prior [application] that would change the prior determination' . . . , and 'shall contain reasonable justification for the failure to present such facts on the prior [application]' " (*Doe v North Tonawanda Cent. Sch. Dist.*, 91 AD3d 1283, 1284). Here, defendants did not proffer a reasonable justification for their failure to submit the subject deposition transcript in support of their summary judgment motion (see *Jones v City of Buffalo Sch. Dist.*, 94 AD3d 1479, 1479; *cf. Pratcher v Hoadley*, 306 AD2d 907, 908) and, in any event, the deposition transcript "would [not have] change[d] the prior determination" (CPLR 2221 [e] [2]; see *Boreanaz v Facer-Kreidler*, 2 AD3d 1481, 1482).