

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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CAROL GARDNER,

Plaintiff,

Index No: 19254/02

Inquest Hearing Date: 4/2/04

Final Submission Date: 5/21/04

-against-

Decision and Order After Inquest

CASSEUS FRANTZ, NEXT GENERATION LIMO,
INC., and NATIONWIDE ASSURANCE CO. ,

Defendants.

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This is a personal injury commenced by Carol Gardner (“plaintiff”), the owner and driver of a 1998 Kia Sephia, that came into contact with a vehicle owned by defendant Next Generation Limo, Inc. (“Next Generation”) and operated by defendant Casseus Frantz (“Frantz”) while traveling on the northbound Van Wyck Expressway in Queens, New York, on August 13, 2000. Upon defendants’ default in answering, by Order of this Court dated April 7, 2003, plaintiff’s motion for a default judgment against Frantz and Next Generation was granted, and the matter was set down for an Inquest as to those defendants; the cause of action against Nationwide Assurance Co. was dismissed. The Inquest was held on April 2, 2004; the record was held open until May 21, 2004, for plaintiff to submit additional documentation. Plaintiff testified at the Inquest. Certified medical records and the affidavits of Ellen J. Braunstein, M.D., and Frank Capone, D.C., were admitted into evidence in support of plaintiff’s personal injury claim, and documentary evidence also was submitted on her property damage and economic loss claims. Plaintiff seeks damages in the amount of \$50,000.00 for past pain and suffering, \$100,000.00 for future pain and suffering, as well as damages for her alleged lost earnings and the costs associated with the loss of her vehicle.

The preliminary determination that must be made by this Court is whether, as a condition precedent to an award of damages, plaintiff, who was granted a default judgment on liability, suffered a “serious injury,” as defined by section 5102(d) of the Insurance Law. That section reads:

"Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents

the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

This Court held in Zafir v. Turbo Trans Corp. and Kiritchenko, 190 Misc.2d 292, that, prior to recovering damages, a plaintiff, even at Inquest, must first establish that a "serious injury" was sustained. Subsequently, the Appellate Division, Second Department, in Zecca v. Riccardelli, 293 A.D.2d 31, held to the same effect. "If a plaintiff establishes a prima facie case that any one of several injuries that he or she sustained in an accident is a 'serious injury' within the meaning of Insurance Law § 5102(d), he or she is entitled to seek recovery for all injuries incurred as a result of the accident" (O'Neill v. O'Neill, 261 A.D.2d 459, 460, 690 N.Y.S.2d 277; Preston v. Young, 239 A.D.2d 729, 731 n. , 657 N.Y.S.2d 499; Kelley v. Balasco, 226 A.D.2d 880, 640 N.Y.S.2d 652)." Bebry v. Farkas-Galindez, 276 A.D.2d 656. The threshold issue is whether the evidence submitted establishes that plaintiff sustained a serious injury.

Plaintiff's Cause of Action

Plaintiff, a New York City Correction Officer, was born on February 2, 1972, and is 32 years of age. A review of the record establishes that on August 13, 2000, plaintiff's vehicle was involved in a collision while driving northbound on the Van Wyck Expressway in Queens, New York, resulting from her car coming into contact with defendants' vehicle that was stopped in plaintiff's lane of traffic without exhibiting either hazard or brake lights. Following the accident, plaintiff was rendered unconscious and was transported by ambulance to Jamaica Hospital, where she was treated for internal bleeding resulting from a lacerated spleen, and subsequently was discharged on August 18, 2000.

Plaintiff testified that she was confined to bed for approximately four to five weeks following her release from the hospital and that she sought treatment from Dr. Frank Capone, her treating Chiropractor, on September 13, 2000, exactly one month after the accident. She testified that on her first visit, she complained of neck and lower back pain, and severe headaches. She further testified that Dr. Capone referred her for diagnostic tests, as well as to Dr. Ellen Braunstein, a neurologist with whom she treated for approximately eight months for severe headaches. She stated that, at the direction of Dr. Braunstein, she was unable to work for a year following the accident. Plaintiff also testified that during that period, her boyfriend did much of the housework and grocery shopping, and that she could not take her daughter out or attend social functions held by her friends or related to her job. She added that she was able to resume her normal activities after returning to work in August 2001, one year after the accident; however, she still suffers from headaches and neck and back pain, and that she continues to see Dr. Capone for a work related injury. Plaintiff also testified that as a result of the damage to her car, she had to rent a car from Enterprise, the cost of which was \$1,120.80, only \$440.00 of which was paid by the insurance company.

Dr. Capone, in his affidavit, dated March 2, 2004, stated that he treated plaintiff for the

injuries she sustained in the August 2000 accident from September 13, 2000 to January 29, 2001. He stated that on her initial visit, plaintiff complained of “severe neck pain into both shoulders and lower back pain into both legs,” as well as severe headaches. He set forth that on his initial examination of plaintiff he found “significant limitations and complaints relative to the cervical and lumbar spine and the patient was referred for cervical and lumbar MRI’s to rule out herniations and/or other possible anomalies.” Dr. Capone stated that the results of the “lumbar MRI was essentially within normal limits. The cervical MRI was significant for a loss of the normal cervical lordosis, which is suggestive of muscle spasm.” He further stated that he provided chiropractic care “consisting of spinal manipulation, electrical stimulation and moist heat.” He confirmed that he referred plaintiff to Dr. Ellen Braunstein in October 2000 for a neurological evaluation “due to the persistence of [the complaints of neck and back pain] and the “debilitating headaches that were reported.” He concluded: “[b]ased upon my physical examinations, review of MRI studies and the history as related by the patient, my diagnosis was cervical and lumbar derangement with associated spasm and radiculopathy.” He further concluded that the “headaches were, with a reasonable degree of chiropractic certainty, due to the cervical injuries and muscle spasms associated therewith,” and added that during his period of treatment, plaintiff “remained totally incapacitated from her usual and customary activities and was advised to remain out of work.” He opined that the injuries sustained are likely to be permanent and were caused by the accident of August 13, 2000. Although Dr. Capone reported some limitation of movement in flexion and extension in the cervical and lumbar spine areas, he did not specify the degree of any limitation nor the objective test employed by him to ascertain such limitation.

Dr. Braunstein, in her affidavit dated February 18, 2004, stated that her initial consultation with plaintiff took place on October 12, 2000, at which time she conducted a neurologic exam, cranial nerve testing and motor testing, the latter of which revealed “restrictive range of motion of her neck.” She stated that she ordered an MRI of the brain “to rule out any structural abnormalities that may have been causing her headaches,” the result of which was “essentially unremarkable.” Subsequently, on October 23, 2000, Dr. Braunstein prescribed Relafen and continued Exedrine Migraine to address plaintiff’s continuing complaint of severe headaches. On plaintiff’s November 29, 2000 and January 19, 2001 visits, Dr. Braunstein stated that plaintiff complained of abdominal pain; Dr. Braunstein stated that she told plaintiff that “as the previously done MRI’s of her brain and lumbar were unremarkable, [] they would not explain the abdominal pain that she was suffering from.”¹ Dr. Braunstein further stated that she recommended, on January 19, 2001, that plaintiff reduce the dosage of Relafen; on May 22, 2001, she increased the dosage of Relafen based upon plaintiff’s complaint

¹Plaintiff sought treatment for her abdominal pain from Dr. Kurta, a surgeon at Jamaica Hospital. On March 8, 1991, a trans-axial computed tomography of the abdomen was done by Dr. Alan Greenfield, M.D., that showed “Left-sided renal cyst measuring 2 cm. With questionable renal cyst complicated by hemorrhage or inflammatory debris on the right.” A March 20, 2001 follow-up sonogram report set forth as the impression: “Simple small simple cyst in both kidneys.” The medical records from Jamaica Hospital covering plaintiff’s hospitalization following the accident, also referenced cysts in both kidney. This condition thus existed prior to the accident of August 13, 2000.

that “she had attempted to return to work but was unable to perform her duties due to worsening of her headaches.” Dr. Braunstein last saw plaintiff on July 19, 2001, at which time she authorized plaintiff’s return to full duty as a Correction Officer, effective August 15, 2001. Dr. Braunstein concluded, with language almost identical to that of Dr. Capone:

Based upon my physical examination, review of MRI studies and the history as related by the patient, my diagnosis, with a reasonable degree of medical probability, was cervical and lumbar derangement with associated spasm and radiculopathy. She also suffered a laceration to the spleen with resultant abdominal pain associated with adhesions in the vicinity thereof. In my opinion, with a reasonable degree of medical probability, she was totally incapacitated from her usual and customary activities for approximately 11 months and is expected to be partially limited on a permanent basis.

A review of the records presented show that plaintiff’s return to work followed the July 9, 2001 independent medical examination conducted by Dr. Burton S. Diamond on behalf of Nationwide Assurance Company, plaintiff’s no-fault carrier. Plaintiff presented to him with “complaints of headache about once a week. . . [and] sporadic low back pain with no other complaints [including] no radicular complaints.” As a result of his examination and the conduct of objective tests, he found that plaintiff had “excellent range of motion of her neck and lower back,” and all other tests were negative. He opined that a “causal relationship exist[ed] between the claimant’s initial complaints and the accident on 8/13/00;” however, he concluded that “[t]here is no need for neurologic testing, treatment, including physical therapy, or follow-up, household help, medical equipment or ambulatory services.” Soon thereafter, Nationwide Assurance, by notice dated August 10, 2001, denied any further no-fault coverage to plaintiff, stating: “AS OF AUGUST 10, 2001 NO FURTHER EXPENSES FOR NEUROLOGICAL CARE/TREATMENT AND OR WAGE LOSS PAYMENTS ARE PAYABLE BY NO-FAULT.”

Discussion

I. Application of the statutory criteria to plaintiff’s “serious injury”

The threshold question is whether plaintiff met her burden by submitting competent evidence that she sustained a “serious injury” within the meaning of section 5102 (d) of the Insurance Law. See, Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345. Plaintiff was diagnosed as suffering from cervical and lumbar spine derangement. A review of case law reveals no instance in which a derangement of the cervical or lumbar spine, standing alone, rose to the “serious injury” level. Moreover, even though a bulging or herniated disc, that certainly is more severe than derangement, “may constitute a serious injury within the meaning of Insurance Law § 5102(d) (see Toure v Avis Rent a Car Sys., 98 N.Y.2d 345; Newman-Bachhuber v. Yukun Hu, 295 A.D.2d 412; Lewis v. White, 274 A.D.2d 455; Chaplin v. Taylor, 273 A.D.2d 188; Flanagan v. Hoeg, 212 A.D.2d 756), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration (citations omitted).” Francis v. Christopher II, ___ A.D.2d ___, ___

N.Y.S.2d ___, 2002 WL 31992496; see, also, Sainte-Aime v. Ho, 274 A.D.2d 569. As the Court of Appeals set forth in Toure v. Avis Rent A Car Systems, Inc., supra, 98 N.Y.2d at 350-351, in examining the “nature and extent of qualitative, objective medical proof necessary for a plaintiff to meet the ‘serious injury’ threshold under the No-Fault Law:”

In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (citations omitted). An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (citation omitted). . . [A]n expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No- Fault Law to eliminate statutorily-insignificant injuries or frivolous claims.

Here, Dr. Capone failed to either quantify the alleged limitation of movement or “identify what objective tests, if any, he performed in arriving at his conclusions concerning alleged restrictions in the [plaintiff's] motion... (see, Kassim v. City of New York, 298 A.D.2d 431, 748 N.Y.S.2d 265; Sainte-Aime v. Ho, 274 A.D.2d 569, 712 N.Y.S.2d 133; Grossman v Wright, supra; Reynolds v. Cleary, 274 A.D.2d 509, 711 N.Y.S.2d 476).” Ersop v. Variano, 307 A.D.2d 951, 952; see, also, Pommells v. Perez, 4 A.D.3d 101; Slasor v. Elfaiz, 275 A.D.2d 771. See, also, Tipping-Cestari v. Kilhenny, 174 A.D.2d 663 [medical reports showing that plaintiff sustained a cervical and lumbar sprain, with an unspecified degree of restriction of cervical motion held insufficient to establish either "permanent loss of use" or "significant limitation" of a body organ, member, function, or system.]

And, even recognizing that an expert's qualitative assessment of a plaintiff's condition may be probative, such an evaluation too must be founded upon an objective basis and must compare the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Toure v. Avis Rent A Car Systems, Inc., supra, 98 N.Y.2d at 351. As set forth above, such an objective basis is lacking here. The injuries complained of here are soft tissue injuries, and “mere soft tissue injury, even if persistent or protracted, will not qualify as a serious injury in the absence of competent medical evidence establishing a meaningful impairment or limitation as a result of the pain.” Rath v. Shafer, 267 A.D.2d 565. A review of Dr. Capone's office records reveal that plaintiff complained of pain in her neck and lower back, notwithstanding that the radiological studies performed at Jamaica Hospital of the cervical spine showed no evidence of abnormalities. The October 6, 2000 MRI studies performed by Horizon Medical Imaging, P.C., of the cervical spine revealed, “no evidence of disc herniation or spinal stenosis,” and an impression of “reversal of the cervical lordosis suggesting muscle spasm.” The November 2, 2000 MRI of the lumbar spine revealed “a normal lumbar lordosis;” “the discs [were] normal in thickness and hydration. No disc bulges or herniations [were] seen.” MRIs of the brain and lumbar spine were “unremarkable.”

The testimonial and documentary evidence simply fail to establish that plaintiff, as a result of her August 13, 2000 accident, sustained a “serious injury” marked by a significant limitation of use of either her cervical or lumbar spine. Moreover, plaintiff’s “treating chiropractor failed to show that he relied upon objective, rather than subjective, medical tests in arriving at his conclusions (citations omitted).” Raugalas v. Chase Manhattan Corp., 305 A.D.2d 654, 656. See, Cocivera v. Waldowsky, 258 A.D.2d 613 [accident victim failed to prove that she sustained the requisite “serious injury” within the meaning of the Insurance Law, despite conclusion of her chiropractor that she suffered constant pain; that conclusion was based upon the victim’s subjective complaints of pain, not a medically determined injury]; Hores v. Guralnick, 255 A.D.2d 292 [affidavit of personal injury plaintiff’s chiropractor, indicating only that plaintiff sustained an unquantified decrease in cervical and lumbar range of motion, was insufficient to satisfy plaintiff’s burden of showing that he sustained the requisite “serious injury.” McKinney’s Insurance Law § 5102(d)]; Slasor v. Elfaiz, 275 A.D.2d 771 [“evidence did not establish that motorist sustained ‘serious injury’ in automobile accident, for purposes of No-Fault tort threshold, where motorist’s doctor failed to set forth what objective tests, if any, were used to examine the motorist, failed to specify the degree of the motorist’s limitation of motion”]; Friedman v. U-Haul Truck Rental, 216 A.D.2d 266 [evidence submitted was insufficient to establish that the injured plaintiff sustained a “permanent consequential limitation of use”]; Tipping-Cestari v. Kilhenny, *supra* [continuing subjective complaints of pain cannot suffice to establish serious injury].

Significantly, Dr. Capone, in his affidavit, states that plaintiff stopped coming to see him for unknown reasons; thus, his affidavit understandably does not provide any information concerning the nature of the plaintiff’s subsequent medical treatment or any explanation for the over three-year gap between plaintiff’s initial chiropractic treatment that ended in January 2001 and his March 2, 2004 affidavit. See, Behm v. Radoccia, __ A.D. 3d __, 775 N.Y.S.2d 356; Mendoza v. Whitmire, A.D. 3d __, 775 N.Y.S.2d 171; Medina v. Zalmen Reis & Assocs., 239 A.D.2d 394. Hence, notwithstanding, Dr. Capone’s assessments, his affidavit also is insufficient to establish “serious injury,” as it does not account for the “gap in treatment immediately preceding the submission of the affidavit (see, Dimenshteyn v. Caruso, 262 A.D.2d 348, 694 N.Y.S.2d 66).” Borino v. Little, 273 A.D.2d 262; Mejia v. Thom, 720 N.Y.S.2d 401. Further, plaintiff “offered no explanation for the more than three-year gap, nor did [she] describe any treatment [se] had received in the interim (see, Taylor v. Jerusalem Air, 280 A.D.2d 466, 721 N.Y.S.2d 67; Slasor v. Elfaiz, 275 A.D.2d 771, 713 N.Y.S.2d 742; Grossman v. Wright, *supra* at 84, 707 N.Y.S.2d 233; Smith v. Askew, 264 A.D.2d 834, 695 N.Y.S.2d 405).” Ersop v. Variano, *supra*, 307 A.D.2d at 952.

Equally lacking in probative value was Dr. Capone’s conclusion that plaintiff’s injuries were permanent. It is well-established that a “treating chiropractor’s projections of permanent limitations, which were based on examinations conducted almost three years before the motion, ha[s] no probative value in the absence of a recent examination (see, Bidetto v. Williams, 276 A.D.2d 516, 713 N.Y.S.2d 764; Mohamed v. Dhanasar, 273 A.D.2d 451, 711 N.Y.S.2d 733; Kauderer v. Penta, 261 A.D.2d 365, 689 N.Y.S.2d 190; Evans v. Mohammad, 243 A.D.2d 604, 663 N.Y.S.2d 273),” Frier v. Teague, 288 A.D.2d 177. Clearly, a physician’s affidavit which is premised on little more than plaintiff’s subjective complaints is insufficient to establish a prima facie case of serious injury. Villalta v. Schechter, 273 A.D.2d 299; Grossman v. Wright, *supra*; Sulimanoff v. Ash Trans Corp., 259 A.D.2d 415; Delaney v. Rafferty, 241 A.D.2d 537. Dr. Capone’s conclusion that, as a result of

plaintiff's injuries, she may have permanent problems describes nothing more than a minor, mild or slight limitation of use, which is insufficient to constitute a serious injury within the definition of the No-Fault statute. See, Arjona v. Calcano, __ A.D. 3d __, 776 N.Y.S.2d 49; see, also, Gaddy v. Eyler, 79 N.Y.2d 955.

Dr. Braunstein's affidavit suffers the same infirmities, and likewise is insufficient to establish that plaintiff, as a result of August 2000 accident, sustained a permanent consequential limitation of use of a body organ or member or significant limitation of a body function, two of the bases upon which plaintiff sought to establish that she sustained a serious injury. However, Dr. Braunstein's course of treatment, as reflected in her affidavit, and plaintiff's testimony do establish colorably that she suffered a medically-determined injury which prevented her from performing all or substantially all of her usual and customary daily activities for 90 of the first 180 days following the collision. The hurdle to overcome is establishing that, as a result of the accident, plaintiff "suffered from a medically determined injury that curtailed her from performing her usual activities to a great extent rather than some slight curtailment" for the statutory period (Licari v. Elliott, *supra*, at 236, 455 N.Y.S.2d 570, 441 N.E.2d 1088; see, Marszalek v. Brown, 247 A.D.2d 827, 668 N.Y.S.2d 138; Williams v. Omera, 190 A.D.2d 618, 593 N.Y.S.2d 821; Gleissner v. LoPresti, 135 A.D.2d 494, 521 N.Y.S.2d 735)." Frier v. Teague, 288 A.D.2d 177.

It is beyond cavil that "[t]o qualify as a serious injury under the 90/180 category, there must be objective evidence of 'a medically determined injury or impairment of a non-permanent nature' (Leahey v. Fitzgerald, 1 A.D.3d 924, 926, 768 N.Y.S.2d 55, quoting Insurance Law § 5102[d]; see Nitti v. Clerrico, 98 N.Y.2d 345, 357, 746 N.Y.S.2d 865, 774 N.E.2d 1197)." Zeigler v. Ramadhan, 5 A.D.3d 1080. Moreover, competent medical evidence must be presented supporting the claim that ones inability to perform substantially all of ones daily activities for not less than 90 of the first 180 days following the subject accident is as a result of that accident. Sibrizzi v. Davis, __ A.D. 3d __, 2004 WL 1110162; Sainte-Aime v. Ho, *supra*; Jackson v. New York City Tr. Auth., 273 A.D.2d 200, 201; Greene v. Miranda, 272 A.D.2d 441, 442; Arshad v. Gomer, 268 A.D.2d 450; Bennett v. Reed, 263 A.D.2d 800; DiNunzio v. County of Suffolk, 256 A.D.2d 498, 499. As was stated by the Appellate Division, Second Department, in Sainte-Aime v. Ho, 274 A.D.2d 569:

The plaintiff's assertion that she was unable to return to work and perform her usual and customary activities after the accident, without objective evidence in support of her allegations of a medically-determined injury which prevented her from performing all or substantially all of her activities, was insufficient to create a triable issue of fact as to her inability to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the accident (citations omitted). The statements made by the appellant's experts in their reports that the plaintiff did not work for three months after the accident were based upon the plaintiff's own self-serving statements and therefore were insufficient to raise a triable issue of fact in the absence of any objective evidence (citation omitted). Moreover, the affidavit of Dr. Denny, the plaintiff's chiropractor, in this regard consisted of nothing more than "conclusory assertions tailored to meet statutory requirements" (citations omitted). Accordingly, the appellant's motion should have been granted.

Here, the record is devoid of any objective evidence to establish a causal connection between any medically-determined injury sustained by plaintiff resulting from the accident and her inability to return to work and perform her usual and customary activities.

_____ There is no question that Dr. Braunstein did not authorize plaintiff's return to work until almost one-year after the accident and that plaintiff received no-fault benefits up to that time. The only reason, however, that plaintiff continued treatment under Dr. Braunstein for an extensive period of time was due to plaintiff's alleged severe headaches, which, on October 23, 2000, Dr. Braunstein "believed" were "coming from her neck pain." Subsequent diagnostic tests performed of the lumbar spine and the brain were unremarkable, and no objective tests established any nexus between plaintiff's headaches and the injuries sustained as a result of the August 13, 2000 automobile accident. Plaintiff's failed attempt to return to work resulted from her inability to perform her duties "due to worsening of her headaches." All prescribed medication, including Relafen, were to address her headaches. In short, there is insufficient evidence to establish that plaintiff's has been "totally incapacitated from her usual and customary activities for approximately 11 months," as a result of the August 13, 2000 accident. See, Foley v. Karvelis, 276 A.D.2d 666 [failure to causally connect alleged injury to the subject accident]; Herman v. Church, 276 A.D.2d 471 [failure to submit competent evidence of suffering from a "medically determined" injury]. As plaintiff failed to offer sufficient objective medical evidence to establish a qualifying injury or impairment under the 90/180 category for establishing a serious injury, she cannot rely upon that statutory criterion to meet the "serious injury" threshold.

II. Presumption of "serious injury" from payment of no-fault benefits²

_____ The question remains as to whether the payment of no-fault insurance benefits to plaintiff for 11 months gives rise to a presumption of "serious injury" that satisfies the 90/180 day requirement under this statute? The short answer is probably not. Section 5102(d) of the Insurance Law sets forth the specific harms that constitute "serious injury." Pursuant to that statutory provision, the party must either sustain one of the specifically enumerated injuries listed in the statute or a medically determined injury not listed in the statute that precludes the party from performing usual and customary activities for no less than 90 of the first 180 days following the injury. The recognition of a presumption based merely upon the payment of no-fault benefits would contravene and thwart the legislative intent underlying the statutory enactment. First, such a presumption would undermine the legislature's purpose in creating the statute. Second, the legislative history of the statute shows a pattern of limiting the definition of serious injury and would not support an attempt to expand that definition.

One of the main purposes of New York's no-fault insurance law is to limit the number of personal injury actions arising from vehicular accidents. Walton v. Lumbermens Mutual Casualty Company, 88 N.Y.2d 211. To limit tort actions for motor vehicle accidents, the legislature drafted section 5102(d) to preclude parties suffering only minor injuries from bringing actions for non-

²Andrew M. Kepple, a second year law student from St. John's University School of Law and a judicial intern in Chambers, assisted in the legal research and writing of this section.

economic loss. Zecca v. Riccardelli, 293 A.D.2d 31. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350, the Court of Appeals, citing Dufel v. Green, 84 N.Y.2d 795, 798, and Licari v. Elliott, 57 N.Y.2d 230, 234-235, reiterated that the “legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries.” By limiting the injuries that are considered to be “serious,” fewer parties can bring actions for non-economic loss. Allowing a presumption of serious injury from payment of no-fault benefits for 11 months does not support the well-established purpose of the statute. Such a presumption would create a way for parties who have suffered only minor injuries to recover for non-economic loss. This would perpetuate the tort actions for non-economic loss that this statute was designed to limit.

Additionally, the legislative history of New York’s no-fault insurance law does not support a presumption of serious injury from payment of benefits for 11 months. The changes made in the statute since its inception show a very narrow interpretation of the term “serious injury.” In 1973, the New York State Legislature enacted the “Comprehensive Automobile Insurance Reparations Act” which included a provision limiting recovery for non-economic loss unless a party has sustained serious injury. McKinney’s Session Laws, 1973, Ch. 13. There, “serious injury” was defined as “death; dismemberment; significant disfigurement; a compound or comminuted fracture; or permanent loss of use of a body organ, member, function, or system” or if medical expenses “necessarily performed as a result of the injury would exceed five hundred dollars.” *Id.* at § 671(4). Governor Rockefeller endorsed the statute, writing that the bill would “eliminate the vast majority of auto accident negligence suits, thereby freeing our courts for more important tasks...” New York State Legislative Annual, Governor’s Memoranda on Bills Approved, 1973, Pg. 298.

The definition of “serious injury” first presented in the no-fault insurance law did not sufficiently achieve the goal of limiting tort claims because the \$500.00 monetary threshold was too easily reached. McKinney’s Session Laws L.1977, Ch. 892, *Memo of the State Executive Department*. In 1977, the legislature repealed the original definition of “serious injury” and replaced it with a more restrictive one. The 1977 definition was nearly identical to the current definition. McKinney’s Session Laws, 1977, Ch. 892. These changes worked to limit tort actions for non-economic loss and helped to effectuate the legislature’s purpose. These changes also show an increasingly narrow definition of “serious injury” used to limit actions for non-economic loss.

The statute was amended again in 1984 to include “loss of a fetus” as a serious injury. That change was precipitated by the result of Raymond v. Bartsch, 84 A.D.2d 60 [holding that a woman who delivered a stillborn after a car accident did not suffer serious injury because loss of fetus was not enumerated in the statute.] Subsequently, the legislature amended the law to include “loss of a fetus” as a serious injury. McKinney’s Session Laws, 1984, Ch. 143. The legislature’s amendment to include “loss of a fetus” illustrates the narrow definition of “serious injury” in the statute. This legislative history portends that the Legislature intended to limit a court’s interpretation of “serious injury” to the statutory definition. In short, in situations where the Legislature determined that the statutory definition should be expanded, it has done so by amending or modifying the statute. Consequently, it must be concluded that if the legislature wanted to create the presumption of “serious injury” merely from payment of no-fault benefits for an extended period of time it would do so by statutory amendment. This Court declines to do so by judicial fiat.

Conclusion

Accordingly, after Inquest, this Court is constrained to hold that plaintiff did not sustain a “serious injury” within the meaning of the Insurance Law, and that the complaint therefore must be, and hereby is, dismissed.

This constitutes the decision and order of the Court.

Dated: July 14, 2004

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J. S. C.