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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

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

Justice

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MONROE ZAFIR,

Index No:21930/00

Inquest Date: 11/5/01

Plaintiff,

Decision After Inquest

-against-

TURBO TRANS CORP. and ARKADI KIRITCHENKO,

Defendants.

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This is an action for personal injury arising out of an automobile accident that occurred on November 8, 1998, on the F.D.R. Drive Southbound near the 71st Street exit in New York, New York, at which time the vehicle in which plaintiff was a passenger came into contact with a vehicle owned by defendant Turbo Trans Corporation and operated by defendant Arkadi Kiritchenko. By decision and order of this Court, dated July 5, 2001, plaintiff's motion for a default judgment was granted with respect to liability, and the matter was set down for an Inquest to determine damages. The Inquest was held November 5, 2001, at which time plaintiff offered evidence with respect to his claim for damages based upon personal injuries.

The preliminary question that must be addressed by this Court is whether, as a condition precedent to an award of damages, plaintiff, who was granted a default judgment on liability, must first establish at Inquest that he suffered a "serious injury," as defined by section 5102(d) of the Insurance Law. The general rule is that a person who is injured as the result of the negligent

operation of a motor vehicle may not recover for noneconomic loss except in the case of a "serious injury," which is defined by section 5102(d) as:

a personal injury which results in ...significant disfigurement;
...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 party from performing substantially
all of the material acts which constitute such person customary daily
activities for not less than ninety days during the one hundred eighty
days immediately following the occurrence of the injury or
impairment.

It is the holding of this Court that, prior to recovering damages, a plaintiff, even at Inquest, must first establish that a "serious injury" was sustained. See, Star v. Badillo, 225 A.D.2d 610, and cases cited therein [holding that the plaintiff could not establish a right of recovery without establishing serious injury.]

That a plaintiff, in the Second Department, is not relieved of the obligation to meet the threshold requirement just because the defendant defaults in answering is supported by the decision of the Appellate Division, Second Department, in Perez v. State, 215 A.D.2d 740. There, the Court stated [215 A.D.2d 741,742]:

Pursuant to the Uniform Rules for the Court of Claims ‘[j]udges are encouraged to order a bifurcated trial of the issues of liability and damages in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action’ (22 NYCRR 206.19[a]). As a general principle, the liability phase of a bifurcated trial is not the proper juncture at which to adjudicate issues regarding the severity of the injuries of the party prosecuting the case. Indeed, in a jury trial the jury is commonly instructed to decide only the question of liability and to disregard as irrelevant any reference to injuries or medical treatment (see, PJI [Supp] 1:35A). As such, during the liability portion of a bifurcated trial arising out of an automobile accident, the fact-finder should be concerned with the apportioning of fault among the parties whose negligence it finds to have been a proximate cause of the accident (see, *DiMauro v. Metropolitan Suburban Bus Auth.*, 105 A.D.2d 236, 246, 483 N.Y.S.2d 383). Issues which pertain to the extent of the injuries suffered by a plaintiff, including whether a plaintiff suffered a serious injury as such term is defined in Insurance Law § 5102(d), should generally be left for the damages phase of the trial (see, e.g., *Keller v. Terr*, 176 A.D.2d 921, 575 N.Y.S.2d 534; *Moreno v. Roberts*, 161 A.D.2d 1099, 557 N.Y.S.2d 657).

Section 202.42 of the Uniform Civil Rules for the Supreme Court and the County Court, in virtually identical language, also encourages a bifurcated trial of the issues of liability and damages. The bifurcated trial indeed is the practice in the Second Department. Compare, Maldonado v. DePalo, 277 A.D.2d 21 [holding by the Appellate Division, First Department, that a prior order granting plaintiffs' motion for partial summary judgment on the issue of liability and directing an inquest necessarily decided that they sustained serious injuries.] This Court's grant of a default judgment on the issue of liability in the instant case certainly was not intended to obviate in any way plaintiff's obligation to show on the Inquest for damages that he sustained a "serious injury." This he failed to do.

Plaintiff testified at the hearing, and submitted as evidence in support of his claim the medical affirmation of Dr. Michael Goldstein, a licensed Chiropractor, dated September 4, 2001, to which were attached medical records, including unsworn reports of Jeffrey Perry, D.O., dated January 21 and March 9, 1999, respectively; unsworn medical records and reports of various other medical providers, including January 4, 1999 and December 23, 1998 M.R.I. reports of Marvin J. Weingarten, M.D., of MRI of Orange-Orange Radiology Associates, and MRI Diagnostics of Rockland, Inc., respectively; and uncertified medical records of Good Samaritan Hospital, Suffern, New York. None of the medical information provided is competent evidence to meet the threshold requirement of establishing a "serious injury."

First, the affirmation of the chiropractor does not constitute competent evidence on this issue; affirmations by chiropractors which are not subscribed before a notary or other authorized

official do not constitute evidence in admissible form. Young v. Ryan, 265 A.D.2d 547; see, CPLR 2106; Doumanis v. Conzo, 265 A.D.2d 296; McNeil v. Crutchley, 250 A.D.2d 655, 671 N.Y.S.2d 692; Gill v. O.N.S. Trucking, 239 A.D.2d 463. Moreover, even if this Court were to consider the medical affirmation of Dr. Michael Goldstein, it would be less than probative, as it is not based upon a recent examination that would raise a triable issue of fact as to whether plaintiff suffered a serious injury as defined by the Insurance Law. See, Atkins v. Metropolitan Suburban Bus Authority, 222 A.D.2d 390; McCleary v. Hefter, 194 A.D.2d 594. Dr. Goldstein, in his September 4, 2001 affirmation, sets forth that plaintiff sustained “small subligamentous central and right of midline herniation at L4-L5. Central and right of midline disc herniation at C5-C6;” he concludes that these injuries “are casually related to the plaintiff’s automobile accident.” He bases this conclusion, in part, upon unsworn medical reports and the results of his examinations, of unknown dates, and treatment. Certainly a disc herniation may constitute a serious injury; however, under the circumstances of this case, it would be “sheer speculation” to conclude that plaintiff’s accident was the cause of any disc herniation. See, Waaland v. Weiss, 228 A.D.2d 435. Nor is any explanation proffered to explain the “gap in treatment immediately preceding the submission of the report (citation omitted).” Borino v. Little, 273 A.D.2d 262; Mejia v. Thom, 720 N.Y.S.2d 401.

Secondly, the medical records from the various care providers were neither affirmed nor certified; the unsworn medical reports submitted by plaintiff cannot properly be considered by this Court. Any medical reports submitted as evidentiary proof must be sworn. See, Grasso v. Angerami, 79 N.Y. 2d 813; Williams v. Hughes, 256 A.D.2d 461; Fernandez v. Shields, 223 A.D.2d 666. Rum v. Pam Transp., 250 A.D.2d 751; Lincoln v. Johnson, 225 A.D.2d 593; Barrett v. Howland,

202 A.D.2d 383; LeBrun v. Joyner, 195 A.D.2d 502. See, Grasso v. Angerami, 79 N.Y.2d 813, 814; Mobley v. Riportella, 241 A.D.2d 443, 444. , 660 N.Y.S.2d 57). Nor, even if considered, do they contain sufficient of evidence to establish that plaintiff's alleged injuries were "serious," within the meaning of Insurance Law § 5102(d), or causally related to the accident. See, Lalli v. Tamasi, 266 A.D.2d 266; Verrelli v. Tronolone, 230 A.D.2d 789.

Finally, plaintiff's subjective complaints of pain are without probative value and insufficient to establish "serious injury." Guzman v. Paul Michael Management, 266 A.D.2d 508; See, Dyagi v. Newburgh Auto Auction, 251 A.D.2d 619. Moreover, plaintiff testified that he received treatment from Dr. Goldstein for six to seven months, and last saw him on June 7, 1999, well over two years ago.

Plaintiff clearly failed to meet his burden by submitting competent evidence that he sustained a "serious injury" within the meaning of Insurance Law § 5102 (d). Ventura v. Moritz, 255 A.D.2d 506; Washington v. Mercy Home For Children, 232 A.D.2d 549; Torres v. Micheletti, 208 A.D.2d 519; Cesar v. Felix, 181 A.D.2d 852; Bates v Peeples, 171 A.D.2d 635); see, also, Gaddy v Eyler, supra, 79 N.Y.2d at pp.956-957); Risbrook v. Coronamos Cab Corp., 244 A.D.2d 397. Accordingly, after Inquest, the complaint is dismissed.

Dated: November 28, 2001

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J.S.C.