

**Griffin v Bianco**

2007 NY Slip Op 31698(U)

June 13, 2007

Supreme Court, Richmond County

Docket Number: 0102761/2005

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

-----X  
PATRICIA A. GRIFFIN,

DCM PART 6

Plaintiff,

-against

Present:  
Hon. Philip G. Minardo

CARMINE R. BIANCO,

**DECISION & ORDER**

Defendant.

Index No. 102761/05  
Motion No. 759 - 002

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The following papers numbered 1 to 3 were used on this motion the 12<sup>th</sup> day of April, 2007:

	Pages Numbered
Plaintiff's Notice of Motion for Leave to Reargue with Supporting Papers.....	1
Defendant's Affirmation in Opposition.....	2
Plaintiff's Reply Affirmation.....	3

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Upon the foregoing papers, plaintiff's motion for leave to reargue the earlier granting of defendant's motion for summary judgment is denied.

This personal injury action arises out of an automobile accident that occurred on October 21, 2004, when a vehicle operated by plaintiff was allegedly struck in the rear by a vehicle owned and operated by defendant. In a Decision and Order dated February 16, 2007, this Court granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the

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meaning of Insurance Law §5102 (d).

In moving for leave to reargue, plaintiff maintains that by granting defendant's prior motion, the Court overlooked and misapprehended the facts and the law regarding plaintiff's right to rely upon the unsworn MRI reports of Drs. Hershowitz (dated November 9, 2004) and Diamond (dated December 22, 2004), as well as the unsigned and unsworn treatment reports of Dr. Edwin Chang (a neurosurgeon) and/or his physician assistants, and Dr. Glen Babus (a pain management specialist) and/or his physician assistants. It is plaintiff's contention that each of these reports "were first referred to in defendant's expert reports." Plaintiff further maintains that, for the same reason, her treating chiropractor, Steven Albert, was entitled to rely upon those reports in reaching his conclusion. Finally, plaintiff contends that she also was entitled to rely upon the reports of Drs. Chang and Babus to demonstrate that there was, in fact, no 22-month gap in treatment, i.e., that she treated continuously post-accident with Dr. Albert, and then with Drs. Chang and Babus.

By way of background, in support of the prior motion for summary judgment, defendant submitted (1) the affirmed independent orthopedic evaluation of Dr. Robert Israel, (2) the affirmed independent neurological evaluation of Dr. Singh, (3) the affirmed independent psychiatric evaluation of Dr. Solomon Miskin, and (4) the unaffirmed MRI report of Dr. Stephen Hershowitz dated November 9, 2004. To the extent relevant, the reports of Dr. Israel, Dr. Singh and Dr. Miskin did *list* the medical records/documents reviewed by each in connection with their examinations of plaintiff,

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and while their lists did include the unaffirmed and unsigned reports of Drs. Chang and Babus (and/or their physician assistants), none of these unsigned and unaffirmed reports were proffered by defendant, nor did Drs. Israel, Singh or Miskin utilize those findings in arriving at their diagnoses.

In view of the foregoing, plaintiff has failed to convince this Court that it overlooked or misapprehended the facts or the law (*see* CPLR 2221[d][2]; *cf.* Doirio v. City of New York, 202 AD2d 625) in concluding that the affidavit of plaintiff's treating chiropractor (Dr. Albert) was without probative value because he improperly relied upon the unsigned and unsworn records of Drs. Chang, Babus, and/or their associates and physician assistants in reaching his conclusions. In addition, plaintiff has failed to establish that the purported records of Drs. Chang and Babus are sufficient, even when read in conjunction with her deposition testimony concerning the termination of no-fault benefits, to establish that there was no gap in her treatment.

In this regard, the Court finds unavailing the authority cited by plaintiff in her attempt to afford evidentiary value to the unsigned and unaffirmed medical reports apparently read by defendant's examining physicians (*see e.g.* Silkowski v Alvarez, 19 AD3d 476; Kearse v New York City Tr. Auth., 16 AD3d 45; Ayzen v Melendez, 299 AD2d 381; Perry v Pagano, 267 AD2d 290). In other words, plaintiff has failed to establish that Drs. Israel, Singh or Miskin relied upon or even "referred" to the unsigned and unaffirmed reports on which plaintiff purported to rely in opposing summary judgment.

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Finally, the Court did consider the unaffirmed MRI report of Dr. Hershowitz in reaching its decision.

Accordingly, it is

ORDERED, that plaintiff's motion for leave to reargue is denied.

E N T E R,

Dated: June 13, 2007

s/Philip G. Minardo  
J.S.C.