

**Chavez v Knapp**

2007 NY Slip Op 32982(U)

September 18, 2007

Supreme Court, Suffolk County

Docket Number: 0004476/2002

Judge: Peter Fox Cohalan

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 MOT. SEQ. # 004, 005, 006 & 007

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

**PRESENT:**

**Hon. PETER FOX COHALAN**

-----x		CALENDAR DATE: April 11, 2007
FIDELFA CHAVEZ, ZURIZAMAR CHAVEZ, an infant		MNEMONIC: MG; MG; MG; MD; C/Disp.
by her parent and natural guardian, MIGUEL CHAVEZ,		
and MIGUEL CHAVEZ, Individually,		<u>PLTF'S/PET'S ATTORNEY:</u>
	Plaintiffs,	Johannesen & Johannesen, LLP
		544 Business Route 25A
		Rocky Point, NY 11778
-against-		
HELEN R. KNAPP,		Martin, Fallon & Mullé
	Defendant.	Attys for Fidelfa Chavez on counterclaim
		100 East Carver St.
		Huntington, NY 11743
-----x		<u>DEFT'S/RESP ATTORNEY:</u>
		Kelly, Rode & Kelly
		218 Griffing Ave.
		Riverhead, NY 11901

Upon the following papers numbered 1 to 65 read on these motions for summary judgment and discovery ; Notice of Motion/Order to Show Cause and supporting papers 1-14; 29-40 ; Notice of Cross-Motion and supporting papers 15-18; 41-46 ; Answering Affidavits and supporting papers 19-25; 47-52 ;53-61 ; Replying Affidavits and supporting papers 26-28; 61-65 ; Other \_\_\_\_\_; and after hearing counsel in support of and opposed to the motion it is,

**ORDERED** that these motions and cross-motion for summary judgment and disclosure are hereby determined as follows:

Plaintiff, Fidelfa Chavez, by her attorneys on the counterclaim, and the defendant, Helen R. Knapp (hereinafter Knapp), both move and cross-move for summary judgment and dismissal of the infant plaintiff Zurizamar Chavez's complaint pursuant to CPLR §3212 and Insurance Law §5102 and 5104 because the infant plaintiff, Zurizamar Chavez, has not sustained a "serious physical injury" as such term is defined in Insurance Law §5102(d). The motion and cross-motion are hereby granted in their entirety and the infant plaintiff, Zurizamar Chavez's action is dismissed.

The defendant Knapp also moves for summary judgment and dismissal of Fidelfa Chavez's complaint pursuant to CPLR §3212 and Insurance Law §5102 and 5104 on the ground that the Fidelfa Chavez has not sustained a "serious physical injury" as such term is defined in Insurance Law §5102(d) and that motion is also granted in its entirety and Fidelfa Chavez's action is also dismissed. The cross-motion for a preclusion order for the defendant Knapp's failure to complete her deposition is denied as moot in light of the Court's decision. The plaintiff Miguel Chavez's loss of services claim is also dismissed in light of the Court's decision dismissing the two (2) plaintiffs' actions.

Fidelfa Chavez sustained such a "serious physical injury" but, upon review of the alleged medical documentation, that action is also dismissed. The cross-motion to preclude or to strike the defendant's answer pursuant to CPLR §3126 (seq. #007) for the defendant's failure to complete her deposition is denied as moot in light of the Court's decision and dismissal of the actions in this case.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. **Elzer v. Nassau County**, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); **Steven v. Parker**, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); **Gaeta v. New York News, Inc.**, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in **Sillman v. Twentieth Century Fox**, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**DiMenna & Sons v. City of New York**, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (**Braun v. Carey**, 280 App. Div. 1019), or where the issue is 'arguable' (**Barnett v. Jacobs**, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (**Esteve v. Avad**, 271 App. Div. 725, 727)."

Although the question of the existence of a "serious injury" is often left to the jury, where properly raised, the issue of whether a plaintiff is barred from recovery in a judicial forum for want of a "serious injury" is, in the first instance, for the Court's determination. **Zoldas v. Louis Cab Corp.**, 108 AD2d 378, 489 NYS2d 468 (1st Dept. 1985); **Dwyer v. Tracy**, 105 AD2d 476, 480 NYS2d 781 (3rd Dept. 1984). If it can be said, as a matter of law, that the plaintiff suffered no serious injury within the meaning of the Insurance Law, then the plaintiff has no claim to assert and there is nothing for the jury to decide. **Licari v. Elliott**, 57 NY2d 230, 455 NYS2d 570 (1982).

Section 5104 of the Insurance Law provides that an individual injured in an automobile accident may bring a negligence cause of action only upon a showing that the individual has incurred a "serious injury" within the meaning of the no-fault law. Insurance Law §5102(d) defines "serious injury" as a personal injury which results in death; dismemberment, significant disfigurement and 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.

A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and concluded that no objective medical findings support the plaintiff's claim. **Turchuk v. Town of Walkill**, 55 AD2d 576, 681 NYS2d 72 (2<sup>nd</sup> Dept. 1998). With this established, the burden shifts to the plaintiff to come forward with admissible evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. **Gaddy v. Eyler**, 79 NY2d 955, 582 NYS2d 990 (1992). In this situation, the plaintiff must present objective medical evidence of the injury based upon a recent examination of the plaintiff. **Grossman v. Wright**, 268 AD2d 79, 707 NYS2d 233 (2<sup>nd</sup> Dept. 2000). Fidelfa Chavez is confronted by the defendant with three (3) medical experts, (Joseph P. Stubel, M.D. an orthopaedist, Marie Audrie DeJesus, M.D., a neurologist and Joel Reiter, M.D., a radiologist) as well as MRI reports by Joel Reiter, M.D. of the cervical spine, lumbar spine and an x-ray of her left knee, attesting to the examination of the plaintiff and their medical findings that she suffers from no significant limitation of use of a body function or system or permanent consequential limitation of movement or use of a body member.

In response to these findings Fidelfa Chavez, an immigrant from Mexico who does not have a command of the English language and speaks Spanish, provides medical records and an affirmation of Devinney who provides a report dated February 9, 2001 for an accident occurring on August 14, 2000 but claims testing occurred in Jan/Feb 2000 in which his clinical interview attests that plaintiff, Fidelfa Chavez, "believes she had post-traumatic amnesia, serious confusion for a few days after the accident." The Court finds it interesting that the "doctor" (Devinney) seems to imply in his report not only that plaintiff diagnosed herself but with the ability to verbalize her condition as "Post Traumatic Amnesia" in a conclusory term rather than Devinney spelling out his clinical findings and his diagnosis of the conditions related to her. In fact, Fidelfa Chavez's reported condition by Devinney mirrors the same conditions and symptoms of her infant daughter, Zurizamar Chavez, of post-traumatic stress disorder and depression without an explanation of the plaintiffs' conditions, both before and after the accident. Without a baseline to establish a condition before and after the accident, Devinney's report appears superficial and without a clear set of dates and visits with regard to the testing methods employed and findings supported by verifiable symptoms and his conclusions.

In particular, Devinney, in his report, observes 'that Fidelfa Chavez has only six (6) years of education in Mexico, a verbal IQ of 85, a performance IQ of 63 and a full scale IQ of 74 and states "her perceptual organization skills and her general speed of focus/execution are very poor and those deficits have brought her scores down radically." The four (4) page report details this young immigrant mother of two who works part time as a cook in Texas and appears with few skills and minimal education skills, as depressed and then draws an unsupported conclusion that her condition stems from an accident in New York without any supporting documents, testing or objective evidence to support the conclusions drawn. Even more incredible is Devinney relating that his patient, (with little formal education), stated to him "she believes that she had post-traumatic amnesia". Finally, Devinney in his report draws

conclusions he is clearly not qualified to make, nor should they have been part of his report since nothing contained within his records establishes any expertise. He states in his report,

“These deficits represent a decline probably associated with a motor vehicle accident. She is moderately anxious and can become depressed. She has pain in that she suffers painful headaches, as well as neck and back pain.”

Clearly, Devinney's report is conclusory in nature lacking detail about his testing methods, objective findings, how they relate to the accident and the dates of testing and why the plaintiff was being tested by Devinney in January and February of 2000 well before the accident in August of 2000. Devinney also notes in his report that Fidelfa Chavez is seeing a chiropractor but fails to identify the chiropractor, nor is any report filed on any claim of a physical injury.

Furthermore, the New York Court of Appeals has stated in **Toure v. Avis Rent A Car**, 98 NY2d 345, 746 NYS2d 865 (2002) that a sufficiently described opinion by a doctor on soft tissue injuries on the “qualitative nature of the plaintiff's limitations based upon the normal function, purpose and use” of that body part is sufficient even without specific degrees of limitation or an arbitrary cutoff of degree. However, the Court in **Toure** went on to state that a diagnosis of a bulging or herniated disc, by itself, does not constitute a serious physical injury and the plaintiff must provide **objective** evidence of the extent and degree of any alleged physical limitations resulting from the spinal injuries, the duration and causality to any limitation of motion. See, **Howell v. Reupke**, 16 AD3rd 377, 790 NYS2d 703 (2<sup>nd</sup> Dept. 2005); **Guzman v. Paul Michael Management**, 266 AD2d 508, 698 NYS2d 719 (2<sup>nd</sup> Dept. 1999).

Generally a soft tissue injury with cervical and low back sprain does not meet the threshold for serious injury (**DeFelippo v. White**, 101 AD2d 801, 475 NYS2d 141). These were the types of injuries which the legislature hoped would no longer burden the court system under the no-fault scheme (**Scheer v. Koubek**, 70 NYS2d 678, 518 NYS2d 788). Neither are subjective complaints of transitory pain due to cervical and lumbar sprains sufficient (**Georgia v. Ramautar**, 180 AD2d 713, 579 NYS2d 743). However, with respect to both the mother plaintiff, Fidelfa Chavez and her daughter, the infant plaintiff, Zurizamar Chavez, plaintiffs' attorney also alleges post-traumatic stress disorder and depression but even here, the court has held in **Taranto v. McCaffrey**, 40 AD3d 626, 835 NYS2d 365 (2<sup>nd</sup> Dept. 2007) that:

“Similarly, although a ‘causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury’ (**Bissonette v. Compo**, 307 AD2d 673, 674, 762 NYS2d 849; see **Brandt-Miller v. McArdle**, 21 AD3d 1152, 1153, 801 NYS2d 834; **Nolan v. Werner Ford**, 100 AD2d 579, 473 NYS2d 516 affd. 64 NY2d 681, 485 NYS2d 526, 474 NE2d 1194), any psychological condition or depression suffered by the plaintiff

was found by the defendants' doctors to be unrelated to the automobile accident, especially in light of the existence of other life stressors and the passage of more than two years prior to the diagnosis of the psychological impairments."

Here, in the case at bar, the infant plaintiff Zurizamar Chavez's emotional or mental deficits are not revealed within the record of medical examinations conducted, whereas Dr. Stubel states the "claimant states that she is otherwise healthy with no previous accidents, injuries, surgeries or chronic diseases" and that she indicates "she is a school student" and "did not miss any school." In an attempt to avoid the granting of this threshold motion, plaintiffs' attorney produced the conclusory medical records of Devinney (Exhibit C, Aff. in Opp.) who in a report dated February 19, 2007 places checkmarks on a form under statements detailed as Re-Experience of Event and Avoidance and Numbness and in his notes again states in conclusory terms:

"She seems to be in a better mood as her affect is positive. She is speaking less of her anxieties. There is no mention of ghosts and such this week. There still is mention of social isolation wherein she does not play with other (*sic*) but stays in her room."

Absent any narrative or objective evidence from this psychologist as to his expertise, his objective findings or a causal relationship between the infant plaintiff's stress and the accident, there is nothing to establish the injury is "serious and verifiable" by objective evidence. See, ***Bissonette v. Campo***, supra. This failure is fatal to any claim that Fidelfa Chavez's or the infant plaintiff Zurizamar Chavez's alleged emotional injuries constitute a serious injury causally related to the accident. ***Taranto v. McCaffrey***, supra. Indeed, as to the infant plaintiff Zurizamar Chavez, Devinney fails to submit an affirmed report or statement about his treatments, diagnosis, prognosis or indeed any factual basis to support his wholly conclusory report of post-traumatic stress disorder and depression nor does he present any history or basis to form a conclusion for his diagnosis. See, ***Rodriguez v. Wheels, Inc.***, 276 AD2d 779, 714 NYS2d 761 (2<sup>nd</sup> Dept. 2000) citing to ***Alcalay v. Town of North Hempstead***, 262 AD2d 258, 690 NYS2d 739 (2<sup>nd</sup> Dept. 1999) holding that a psychological injury must be supported with competent medical evidence.

The Court is confronted with soft tissue injuries and subjective complaints of pain by Fidelfa Chavez and her infant daughter, Zurizamar Chavez, in conclusory fashion only, while the plaintiffs' attorney on the counterclaim and the defendant detail medical reports by the defendants' medical doctors suggesting no restrictions of movement or range of motion or any other pathology to support any injury. Clearly, the failure to submit some medical authority to support the plaintiffs' subjective complaints of pain as well as detailed findings and conclusions on their claims of post-traumatic stress disorder on behalf of her and her infant daughter is fatal to their opposition to the motions and cross-motion for summary disposition and dismissal of the action of both plaintiffs.

Under the facts and circumstances as presented in this case and after reviewing the deposition testimony of the parties, all the medical exhibits submitted in support of the motions and the medical claims of Devinney in opposition thereto as to plaintiff Fidelfa Chavez, and limited medical records from Devinney as to the infant plaintiff, Zurizamar Chavez, the Court concludes that the plaintiffs have failed, as a matter of law, to establish the threshold of sustaining any serious physical injury and/or emotional injury or establishing any causal relationship with the motor vehicle accident occurring on August 14, 2000. A review of the medical submissions has failed to raise a triable issue of fact that either of the plaintiffs sustained any serious physical injury and therefore the plaintiff on the counterclaim's motion directed to Zurizamar Chavez' action as well as the defendant Knapp's cross-motion as to Zurizamar Chavez and the motion as to Fidelfa Chavez for summary judgment and dismissal of both plaintiffs' actions pursuant to CPLR §3212 are hereby granted and the plaintiffs' actions are dismissed.

As the Court noted in Andre v. Pomeroy, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (Millerton Agway Co-op v. Briar-cliff Farms, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Accordingly, the motion for summary judgment by the plaintiff, Fidelfa Chavez, through her attorneys on the counterclaim and the defendant Knapp's motion and cross-motion for summary judgment and dismissal of the infant plaintiff's action pursuant to CPLR §3212 and Insurance Law §5102 and 5104 on the ground that the infant plaintiff, Zurizamar Chavez, has not sustained a "serious physical injury" as such term is defined in Insurance Law §5102(d) are hereby granted in their entirety and the infant plaintiff Zurizamar Chavez's action is dismissed. The defendant Helen Knapp's motion for summary judgment and dismissal of Fidelfa Chavez's action pursuant to CPLR §3212 is also granted and Fidelfa Chavez's action is also dismissed. In light of the Court's ruling dismissing these actions, it need not reach the plaintiff's cross-motion to preclude or to strike the defendant's answer and that motion is denied as moot.

The foregoing constitutes the decision of the Court.

Dated: September 18, 2007



J.S.C.