

**Robinson v Duffy**

2008 NY Slip Op 30358(U)

January 30, 2008

Supreme Court, Nassau County

Docket Number: 6806-03/

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

SHARIF ROBINSON, an infant under the age of fourteen (14) years by his father and natural guardian, STEPHEN ROBINSON, and STEPHEN ROBINSON, individually,

Plaintiff(s),

- against -

MATTHEW DUFFY,

Defendant(s).

TRIAL/IAS PART 9

INDEX NO. 16806/03

MOTION SEQUENCE NO. 2

MOTION SUBMISSION DATE: November 20, 2007

The following papers read on this motion:

|                         |   |
|-------------------------|---|
| Notice of Motion        | X |
| Affidavit in Opposition | X |
| Reply Affirmation       | X |
| Memorandum of Law       | X |

Upon the foregoing papers, the motion by the defendant for an Order granting summary judgment in favor of defendant, Matthew Duffy and dismissing plaintiffs' complaint on the ground that plaintiff Sharif Robinson did not sustain a "serious injury" as defined by New York Insurance Law §§5102(d) and 5105 as required to bring a claim for personal injury arising from a motor vehicle accident, is determined as hereinafter provided:

This personal injury action arises out of an incident that occurred on June 22, 2002 at approximately 3:16 pm on Landscape Drive at its intersection with Barrington Boulevard, Town of Babylon, Suffolk County, New York. At that time the infant was riding a bicycle that was struck by a motor vehicle driven by the defendant.

The plaintiffs in the plaintiffs' Verified Bill of Particulars sets forth:

"The infant plaintiff, Sharif Robinson, sustained serious and severe personal injuries and harm. Amongst others, he sustained:

lack of posterior meniscal tibial attachment of a lateral meniscus and a central high signal of the lateral meniscus reflecting a wristburg variant discoid

meniscus of the left knee;

subchondral cysts at both the lateral and medial aspect of the trochlea;

the above required the use of crutches;

abrasion to forehead resulting in scarring.

In addition, infant plaintiff sustained injuries to his skin, muscle, tissue, fascia, nerves and musculature in and about the affected areas and parts, as well as mental anguish, loss of enjoyment of life and severe shock to his nerves and nervous systems.

All of the aforesaid injuries are permanent."

The plaintiff's Supplemental Verified Bill of Particulars states:

"2. In further response to item number "31" of the plaintiffs' Verified Bill of Particulars dated December 15, 2005, it is alleged that infant plaintiff, Sharif Robinson, suffered a significant limitation of use of a body function as a result of the subject accident. It is alleged that as a result of the left knee injuries sustained by the infant plaintiff, he has suffered significant limitation in the use of his left leg and knee, including pain, tenderness and decrease/limited/restricted range of motion therein.

3. In further response to item number "33", of the plaintiffs' Verified Bill of Particulars dated December 15, 2005, it is alleged that Infant Plaintiff, Sharif Robinson, has suffered a medically determined injury of a non-permanent nature which, it is alleged, prevented the infant plaintiff from performing substantially all the material acts which constituted his usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days following the subject accident. As a result of the injuries sustained in the subject accident, Infant Plaintiff, Sharif Robinson, experienced pain, tenderness and decreased/limited/restricted range of motion in his left knee and leg, thereby causing him to be unable to partake in his normal activities as a ten (10) year old child, including playing with friends, partaking in sports and other activities normally associated with a child of ten (10) years of age. Plaintiffs reserve the right to supplement this response upon the completion of discovery herein.

4. In further response to item number "34" of the plaintiffs' Verified Bill of Particulars dated December 15, 2005, it is alleged that Infant Plaintiff, Sharif Robinson, has suffered a medically determined impairment of a non-permanent nature which, it is alleged, prevented the infant plaintiff from performing substantially all the material acts which constituted his usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days following the subject accident. As a result of the injuries sustained in the subject accident, Infant Plaintiff, Sharif Robinson, experienced pain, tenderness and decreased/limited/restricted range of motion in his left knee and leg, thereby causing him to be unable to partake

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in his normal activities as a ten (10) year old child, including playing with friends, partaking in sports and other activities normally associated with a child of ten (10) years of age. Plaintiff reserve the right to supplement this response upon the completion of discovery herein."

In support of the instant application, the defendant, amongst other things, submits the October 18, 2006 deposition transcripts of the respective plaintiffs Sharif Robinson and Stephen Robinson; the infant plaintiff's Good Samaritan Hospital record; a letter report dated November 9, 2004 of Winthrop Orthopaedic Associates, PC, by David Zaret, MD, an orthopedist, a treating physician of the infant plaintiff; and a November 2, 2006 letter of Ross Orthopedic Group, PC by Bruce R. Ross, MD, a treating physician of the infant plaintiff.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (see *Licaro v. Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; *Palmer v. Amaker*, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; *Tipping-Cestari v. Kilhenny*, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; *Wright v. Melendez*, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) '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."

The Court initially observes that the defendant's medical submission in support of the defendant's requested relief consists of the foregoing unsworn medical records of the infant plaintiff's treating medical providers. In examining this issue, the Court in **Pagano v Kingsbury**, 182 AD2d 268, 587 NYS2d 692 (Second Dept., 1992) stated:

"However, there are prior decisions of this court which appear to hold to the contrary but are distinguishable and continue to retain their vitality (*see, e.g. Padron v Hood*, 124 AD2d 718, 508 NYS2d 472, *Popp v Kremer*, 124 AD2d 720, 508 NYS2d 470; *Ingles v Yurchak*, 125 AD2d 452, 509 NYS2d 382; *Songer v Muthig*, 131 AD2d 657, 516 NYS2d 737). A close scrutiny of these cases indicates that the defendants therein, in support of their motions for summary judgment, submitted unsworn reports of the plaintiffs' physicians which demonstrated that the plaintiffs had not suffered a "serious injury". Clearly, consideration of a plaintiff's unsworn medical reports submitted in support of a defendant's motion for summary judgment, based on the plaintiff's failure to establish "serious injury", fosters the expeditious disposition of these cases, and is perfectly harmonious with the principle that the "serious injury" threshold is a threshold imposed solely on plaintiff (*see, Licari v Elliot*, 57 NY2d 230 [455 NYS2d 570, 441 NE2d 1088])" (*Miller v Metropolitan Suburban Bus Authority*, NYLJ, Sept. 11, 1990, at 27, 1, supreme Court, Nassau County, Brucia, J.)."

**Pagano v Kingsbury, supra at 694**

As such, the Court will consider will consider the respective unsworn records in support of the defendant's application.

Amongst other things, the respective reports from the Radiology Department of Good Samaritan Hospital done on the day of the accident in issue set forth:

"CERVICAL SPINE STUDY: 06/22/2002.

FINDINGS: AP, LATERAL AND OPEN MOUTH VIEWS OF THE CERVICAL SPINE DEMONSTRATE C1 THROUGH C7 - T1. NO FRACTURE OR DISLOCATION IN IDENTIFIED. NO PREVERTEBRAL SOFT TISSUE SWELLING IS SEEN. THE AP VIEW IS WITHIN NORMAL LIMITS. THE OPEN MOUTH VIEW IS ALSO WITHIN NORMAL LIMITS.

IMPRESSION:  
NO EVIDENCE OF FRACTURE OR SUBLUXATION.

HEAD CT: 06/22/2002

THE CORTICAL GRAY MATTER, WHITE MATTER, DEEP GRAY MATTER,

[\* 5 ]

VENTRICLES, BRAINSTEM, AND CEREBELLUM ARE WITHIN NORMAL LIMITS. NO MASS, BLEED, OR EDEMA IS PRESENT. THE BONE WINDOWS DEMONSTRATE NO FRACTURES. A SMALL RIGHT ANTERIOR PARIETAL SCALP HEMATOMA IS IDENTIFIED.

CONCLUSION:

- 1) NO EVIDENCE OF INTRACRANIAL ABNORMALITY
- 2) SMALL RIGHT ANTERIOR PARIETAL SCALP HEMATOMA.

LEFT FEMUR SERIES: 06/22/2002

STANDARD VIEWS SHOW NO EVIDENCE OF FRACTURE OR SIGNIFICANT OSSEOUS ABNORMALITY OF THE LEFT FEMUR.

AP PELVIS: 06/22/2002

FINDINGS: EXAMINATION REVEALS THE OSSEOUS COMPONENTS OF THE PELVIS TO BE WELL VISUALIZED AND NORMALLY OUTLINED. THERE IS NO EVIDENCE OF GROSS OSSEOUS OR ARTICULAR ABNORMALITY.

LEFT TIBIA AND FIBULA: 06/22/2002

FINDINGS: STANDARD VIEWS SHOW NO EVIDENCE OF FRACTURE OR SIGNIFICANT OSSEOUS ABNORMALITY OF THE LEFT TIBIA AND FIBULA.

AP CHEST: 06/22/2002

FINDINGS: RADIOGRAPHIC EXAMINATION OF THE CHEST REVEALS NO GROSS OSSEOUS ABNORMALITY. THE HEART, GREAT VESSELS AND HILAR DENSITIES ARE UNREMARKABLE. THE LUNG FIELDS APPEAR CLEAR AND NO PARENCHYMAL OR PLEURAL PATHOLOGY IS DEMONSTRATED.

IMPRESSION:  
NORMAL CHEST."

The letter report of Dr. Zaret states:

"PHYSICAL EXAMINATION

His left lower extremity was examined. He has a 2+ DP and PT pulses. No gross neurologic deficit. He has 5/5 strength on ankle dorsiflexion, plantar flexion, knee flexion and extension as well as hip flexion, abduction, and adduction. There is some mild tenderness around the posterolateral aspect of the knee. There is no collateral ligament instability at 0,30,60 and 90 degrees. There is a 2+ anterior Draw compared to 1+ on the other side. This reproduces pain during the anterior Draw maneuver. There is no evidence of any posterolateral instability. There is no tenderness in the thigh or anywhere else in the lower leg, foot or ankle.

[\* 6 ]

**RADIOLOGIC STUDIES**

X-rays, AP and lateral views of the left knee were reviewed. They show no evidence of any fracture, subluxation or dislocation.

**ASSESSMENT**

Left knee strain possibly ACL tear.

I do feel it seems to be a mild instability on the anterior Draw test. Therefore, I will send him for an MRI. He will return in two weeks after the MRI has been obtained."

The MRI performed at Winthrop Radiology Associates, PC pursuant to Dr. Zaret's instruction, sets forth:

"MRI OF THE LEFT KNEE:

HISTORY: 12 YEAR OLD BOY WITH LEFT KNEE PAIN.

MAGNETIC RESONANCE IMAGING WAS PERFORMED OF THE LEFT KNEE UTILIZING AXIAL, CORONAL AND SAGITTAL FAST SPIN ECHO IMAGING TECHNIQUES. THE STUDY WAS LIMITED TO MOTION, DESPITE PULSE ACQUISITION. THE STUDY WAS ALSO LIMITED TO LACK OF PATIENT COOPERATION.

THE ANTERIOR AND POSTERIOR CRUCIATE LIGAMENTS ARE INTACT.

THE COMPONENTS OF THE POSTERIOR LATERAL CORNER ARE PRESERVED. THE MEDIAL COLLATERAL LIGAMENT IS INTACT.

EVALUATION OF THE MENISCI DEMONSTRATES SA THICKENED POSTERIOR MENISCAL FEMORAL ATTACHMENT OF THE LATERAL MENISCUS WITH LACK OF POSTERIOR MENISCAL TIBIAL ATTACHMENT OF THE LATERAL MENISCUS AND A CENTRAL HIGH SIGNAL OF THE LATERAL MENISCUS REFLECTING A WRISBURG VARIANT DISCOID MENISCUS WITHOUT TEAR. THE MEDIAL MENISCUS IS PRESERVED.

THE ARTICULAR CARTILAGE OF THE TIBIOFEMORAL ARTICULATION IS PRESERVED. THE ARTICULAR CARTILAGE OF THE TROCHLEA AND PATELLAR ARE MARKEDLY LIMITED TO MOTION. PROMINENT SUBCHONDRAL CYSTS, HOWEVER ARE EVIDENT AT BOTH THE LATERAL AND MEDIAL ASPECT OF THE TROCHLEA, LIKELY REFLECTING OVERLYING CARTILAGE PATHOLOGY. THE CARTILAGE IS POORLY VISUALIZED. MODERATE SURROUNDING BONE MARROW EDEMA PATTERN IS EVIDENT SURROUNDING THE SUBCHONDRAL CYSTS, MOST PROMINENT ALONG THE LATERAL HALF OF THE TROCHLEA.

NO OTHER ABNORMAL SIGNAL IS EVIDENT OF THE BONE MARROW TO REFLECT FRACTURE OR OSTEONECROSIS. A SMALL JOINT

[ 7 ]

EFFUSION IS EVIDENT. A FOCUS OF SOFT TISSUES (1.08 X 0.62 CM) IS EVIDENT IN THE PROXIMAL POPLITEAL REGION, LIKELY REFLECTING A LYMPH NODE.

THE PATELLA TENDON AND QUADRICEPS MECHANISM ARE PRESERVED.

IMPRESSION:

MAGNETIC RESONANCE IMAGING OF THE LEFT KNEE DEMONSTRATES LACK OF POSTERIOR LATERAL MENISCAL TIBIAL ATTACHMENT PROMINENCE OF THE LIGAMENT OF WRISBURG WITH MILD THICKENING AND CENTRAL HIGH SIGNAL OF THE LATERAL MENISCUS. REFLECTING A WRISBURG VARIANT DISCOID MENISCUS WITH MILD MUCOID DEGENERATION AND NO TEAR."

The November 2, 2006 correspondence of Dr. Ross states:

"Sharif Robinson is a 14 year old male, who presents to this office, today, for evaluation of injuries to both his right and left knee. The patient was accompanied by a parent and the history related was that the patient was riding on a bicycle, on June 22, 2002, when he was struck by a car, sustaining injury to both knees. He was taken to Good Samaritan Hospital, where x-rays were taken and he was treated for injuries to his head and both knees and subsequently discharged. At the time of initial evaluation, the patient's chief complaint was that of persistent pain, swelling and limitation of motion in both knees, ambulating with a limp and inability to play sports without pain and as skillfully as he did prior to the accident. The patient does also present with medical records for review. The patient had no significant medical history prior to the accident.

The patient did come under the care of the Winthrop Orthopedic Associate Group and specifically Dr. Zaret, who did evaluate the child, on October 9, 2004, at which time the patient was still having complaints of leg pain and in particular, when playing and running playing football. Review of that note does reveal that Dr. Zaret was suspicious for instability in the left knee and did refer the child for an MRI which was negative for meniscal tear, although was suspicious for an instability of the lateral meniscus. Since that time, the patient has not had any definitive diagnosis or treatment but does continue to experience pain and loss of function.

Upon examination at the time of this evaluation, there is no obvious deformity noted. There is a synovitis noted to the left knee with patellofemoral apprehension and crepitation. There is no point tenderness along the joint line or gross instability noted. Varus valgus and anterior posterior draw testing is within normal limits. The patient is neurologically and vascularly intact. Concerning the right knee his examination is similar. The patient has patellofemoral apprehension and crepitation, with no gross instability. Range of motion is limited by pain to 105° of flexion.

A previous MRI was reviewed with the patient and his father. Risks, alternatives and benefits of all forms of treatment were discussed with the

patient and the father.

The impression at this time is that of posttraumatic chondromalacia patella, bilaterally right worse than left. I do believe that this diagnosis is causally related to the accident described above, that it is persistent in nature and likely to be progressive in nature. I have explained to the patient and his father that he may require physical therapy, anti-inflammatory medication and/or bracing in the future and that when he reaches skeletal maturity, if he is still highly symptomatic, then arthroscopic surgery would be indicated at that time. However, it was explained that although the surgery would not be curative in nature, it would help to diminish his symptomatology."

A review of the infant plaintiff's deposition transcript sets forth subjective complaints of pain which are insufficient to establish a serious injury pursuant to §5102 of the Insurance Law (see, **Scheer v Koubek**, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309).

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center**, 64 NY2d 851, 853; **Pagano v. Kingsbury**, supra at 694) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (see **Gaddy v. Eyler**, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; **Jean-Meku v. Berbec**, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; **Horan v. Mirando**, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995).

In opposition to the requested relief, the defendant submits same medical records as submitted by the defendant; an affirmation of Jonathan S. Luchs, MD as to the MRI of the infant plaintiff's left knee performed at Winthrop Radiology Associates, PC and an affirmation from Bruce R. Ross, MD as to the infant plaintiff's November 2, 2006 office visit.

To the extent that Dr. Luch's affirmation attests to the findings upon review of the MRI of the infant plaintiff's left leg performed by Winthrop Radiology Associates, PC, said affirmation does not causally relate the condition set forth therein and in the report to June 22, 2002 accident in issue (see, **Ukonu v Velazquez**, 213 AD2d 628, 624 NYS2d 195 (Second Dept., 1995)

Dr. Ross sets forth in said physician's affirmation that he examined the infant plaintiff on November 2, 2006 in regards to certain alleged injuries sustained in the June 22, 2002. Dr. Ross' affirmation does not offer any explanation for the four year gap in treatment of the infant plaintiff by any health care provider (see, **Pommells v Porez**, 4 NY3d 566, 797 NYS2d 380; **Nemchyonok v Peng Liu Ying**, 2 AD3d 421, 767 NYS2d 811 (Second Dept., 2003).

Based upon the foregoing, the defendant's application for an Order granting summary judgment in favor of defendant, Matthew Duffy and dismissing plaintiffs' complaint on the ground that plaintiff Sharif Robinson did not sustain a "serious injury" as defined by New York Insurance Law §§5102(d) and 5105 as required to bring a claim for personal injury arising from a motor vehicle accident, is granted.

SO ORDERED.

DATED:

1/30/2008

*Ray S. Webb*  
ENTERED J.S.C.

FEB 01 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE