

Parness v Bradbury

2008 NY Slip Op 32959(U)

October 22, 2008

Supreme Court, Nassau County

Docket Number: 014329/07

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

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

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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**RORY PARNESSE, an infant, by his mother and
natural guardian, LINDA PARNESSE, and LINDA
PARNESSE, individually,**

TRIAL TERM PART: 48

Plaintiffs,

-against-

INDEX NO.: 014329/07

**MOTION DATE: 9-5-08
SUBMIT DATE: 10-20-08
SEQ. NUMBER - 001**

**DENNIS BRADBURY and CHRISTINE
BRADBURY,**

Defendants.

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The following papers have been read on this motion:

- Notice of Motion, dated 7-30-08.....1**
- Affirmation in Opposition, dated 10-2-08.....2**
- Reply, dated 10-16-08.....3**

This motion by the defendants pursuant to CPLR 3212 and Insurance Law Article 51 for summary judgment dismissing the complaint on the ground that the infant plaintiff has not sustained a "serious injury" as that term is defined by the Insurance Law is granted and the complaint is dismissed.

This personal injury action is the result of an automobile-bicycle accident which occurred on September 6, 2006. The plaintiffs allege that Rory Parness ("Rory"), an infant who was then 14 years of age, was riding a bicycle and was struck by the defendants' vehicle,

which was owned by defendant Christine Bradbury and was being operated by defendant Dennis Bradbury. Plaintiffs allege that as a consequence of the accident he has sustained a “serious injury” within the ambit of Insurance Law §5102(d). His mother and natural guardian Linda Parness also has asserted a derivative claim for expenses incurred and for loss of services.

“Serious injury” is defined by § 5102(d) of the New York Insurance Law as follows:

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 persons’ usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment. (Ins. Law § 5102(d)).

In their bill of particulars the plaintiffs assert that Rory sustained a permanent consequential limitation of use of a body organ or member, and 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 persons’ usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment.

Defendants move for summary judgment on the ground that no such injury exists.

On this motion the defendants submit, *inter alia*, the affirmed report of Peter Chiu, M.D., Board-Certified in physical medicine, rehabilitation and acupuncture, Isaac Cohen,

M.D., a Board-Certified orthopedic surgeon, David A. Fisher, M.D., a Board-Certified radiologist, and a transcript of Rory's examination before trial. On May 28, 2008 Dr. Cohen performed objective testing on Rory through the use of a goniometer, comparing his findings to what is normal, and found no restrictions on movement in the cervical or lumbosacral spines, nor in the knees. His diagnosis was multiple soft tissue contusions, including left and right knee contusions, and resolved cervical strain.

Dr. Fisher reviewed MRI films taken of the cervical spine and both knees, and found them "unremarkable," with no evidence of disc herniation or significant disc bulge. With regard to the knees, he found all internal structures to be intact, with no significant joint effusion, bone marrow edema or osteochondral defect.

At his EBT, Rory testified that he lost no time from school, and was returned to participation in his gym class before Christmas, with no restrictions. He did report that as of the date of the EBT, April 10, 2008, that he experienced a "weird feeling" in his knees, that they "scrape and pop" and that they would buckle if he were carrying weight. He also reported frequent neck pain, and that he takes Tylenol or Motrin to alleviate such pain.

On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action. *Hughes v Cai*, 31 AD3d 385 (2d Dept. 2006); *Browdame v Candura*, 25 AD3d 747, 748 (2d Dept. 2006). Defendant's medical expert(s) must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body

part. *Browdame v Candura*, *supra* at 748. Whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of a body part. *Dufel v Green*, 84 NY2d 795, 798 (1995).

If the movant satisfies this burden, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof regarding the nature and degree of the injury, that he/she sustained a serious injury, or that there are questions of fact as to whether the purported injury, in fact, is serious. *Flores v Leslie*, 27 AD3d 220, 221 (1st Dept. 2006).

As noted, in order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 351 (2002); *Scheer v Koubek*, 70 NY2d 678, 679 (1987); *Munoz v Hollingsworth*, 18 AD3d 278, 279 (1st Dept. 2005).

Based on the foregoing, the Court finds that the defendants have met their initial burden. Although the infant plaintiff did complain about his knees and neck at the time of his EBT, they amount to no more than subjective reports of discomfort that do not serve to undermine the medical proof advanced that there was no permanent consequential limitation of any body organ or member. With respect to the "90/180" claim, the EBT revealed that the accident did not cause any significant effect on Rory's activities during the measuring period.

In response, the plaintiffs have failed to place Rory's condition in issue. Initially, there is absolutely no evidence presented that there was a medical basis for significant restrictions on Rory's activities during the first 180 days post-accident, and thus this claim

must be dismissed. *See, e.g., Mauchy v Nieves*, 19 AD3d 560 (2d Dept. 2005).

With respect to any permanent injury, the proof is inadequate. The MRI report and affirmation of a radiologist, Dr. Richard Rizzutti, refers to a disc bulge at C5-6 impinging on the anterior aspect of the spinal canal. However, it is well-established law that disc bulges, or even herniations, are insufficient to meet the threshold requirement of serious injury if they cannot be related to a specific restriction on movement. *See, e.g., Yakubov v CG Trans Corp.*, 30 AD3d 509 (2d Dept. 2006); *Kearse v New York City Trans. Auth.*, 16 AD3d 45 (2d Dept. 2005). They are not so related here.

The Court also looks to the several affirmed reports by Nizarali Vishram, M. D., a treating physician, which have been submitted by the plaintiffs. The last report, dated September 22, 2008, is particularly useful in that it summarizes the content of the others and the progress made by Rory during treatment.

As of April 10, 2007, Dr. Vishram stated that “cervical exam revealed active range of motion was complete.. Bilateral knee exam revealed active range of motion was complete.” On May 29, 2007 he reported that “neck pains and knee pains had improved with physical therapy... physical therapy has now discontinued.” Although there were additional visits on January 2008, and monthly from March through September 2008, the only ongoing complaint was of neck pain. However, range of motion testing revealed improvement from May through September, and by July 29, 2008 left and right rotation of the neck was 70/80, and passive range of motion flexion and extension was complete. The final reported exam was on September 8, 2008, and as of that date the rotations were stated to be complete as well.

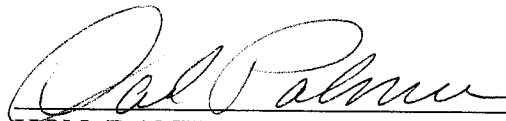
The Court finds that this indicates that there was no “serious injury” to the cervical spine, and that Rory had ceased complaining about his knees. To the extent that Dr. Vishram does refer to injury to the left and right knees, the same is inadmissible as proof on this motion in that he relies on the clinical impression of Dr. Lee M. Kupersmith, and the radiology findings of John Himelfarb, M.D., other physicians who have not submitted their own sworn statements. *See, Claude v Clements*, 301 AD2d 554 (2d Dept. 2003); *Delgado v Hakim*, 287 AD2d 592 (2d Dept. 2001).

The Court finds that plaintiffs have failed to sustain their burden on this motion. The claims made by Rory Parness based upon his having sustained a “serious injury” therefore must be dismissed. The derivative claim of Linda Parness falls as well. *See, Sougstad v Meyer*, 40 AD3d 839 (2d Dept. 2007). Accordingly, the complaint is dismissed in its entirety.

This shall constitute the Decision and Order of this Court

ENTER

DATED: October 22, 2008


 HON. DANIEL PALMIERI
 Acting Supreme Court Justice

ENTERED

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