SUPREME COURT OF THE STATE OF NEW YORK **Index No.:104203/07**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 002**

LAWRENCE BREWER,

Plaintiff

against

ALLAN SYDNEY LEWIS *and*
ALLAN E. LEWIS

***Defendant*s**

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion for summary judgment.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Affidavits	**3**
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants move this court for an order pursuant to *CPLR* § 3212 seeking to dismiss plaintiff's complaint on the grounds that the plaintiff has not sustained a serious injury as defined by *Insurance Law* § 5102(d). Defendants' motion is denied in its entirety.

Facts

This action arises out of a motor vehicle accident that took place on December 5, 2006 in front of 201 Van Duzer Street, Staten Island, New York. The accident occurred as defendant Allan E. Lewis was pulling out from a parked position in front of his house at the same time that the plaintiff's vehicle was passing by. The plaintiff alleges that as a result of this accident he sustains injuries to his lumbar spine.

Discussion

The defendants seek summary judgment on the ground that the plaintiff has not sustained a "serious injury" as defined by *Insurance Law* § 5102.[1] The serious injury threshold set forth in *Insurance Law* § 5104(a) can only be established under these categories.[2] Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained.[3] Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness, or disease,[4] that results in one of the nine serious injury threshold categories.[5]

Courts have consistently held that the No-Fault Law must be interpreted to fulfill the policies the legislature had in mind.[6] It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of "serious injury."[7]

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[1] A serious injury must be a personal injury, "[W]hich 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 constitutes 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" (*Insurance Law* § *5102* [d]).

[2] *Coon v. Brown*, 192 AD2d 908 [3d Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3d Dept 1982].

[3] *Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].

[4] 11 NYCRR §65-2.1[e].

[5] *Van Norstrand v. Regina*, 212 AD2d 883 [3d Dept 1995].

[6] *Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].

[7] *Licari v. Elliott*, 57 NY2d 230, 237 [1982].

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 conclude that no objective medical findings support the plaintiff's claim. In the case before this court, the defendants came forward with the affirmed statements of Dr. Robert Israel, an orthopedic surgeon, Dr. Naunihal S. Singh, a neurologist, and Dr. David A. Fisher, a radiologist. After reviewing the plaintiff's medical records and using the goniometer testing method, Dr. Israel and Dr. Singh concluded that the plaintiff's sprain of the lumbar spine has been resolved. Dr. Fisher opined that any changes in the lumbar spine are evidence of degenerative changes consistent with a preexisting condition.

Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.[8] The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.[9] The plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury.[10]

The plaintiff alleges injuries that are consistent with a permanent consequential limitation of her cervical spine. This category of injury involves any "limitation" of use which is more than "minor, mild or slight," as contrasted to the loss-of-use category which requires proof of a "total loss" of use.[11] The "consequential limitation of use" category requires that the limitation be permanent, whereas the "significant limitation of use" category does not require that the

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[8] *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

[9] *Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2d Dept 2000].

[10] *Grossman v. Wright* 268 AD2d 79 [2d Dept 2000].

[11] *Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295 [2001]; *Gaddy v. Eyler*, 79 NY2d 955 [1992].

limitation be permanent.[12] Furthermore, the "consequential limitation of use" must be with respect to a body organ or member, whereas the "significant limitation of use" must be with respect to a body function or system.

A designation set forth by medical proof of a numeric percentage or degree of a plaintiff's loss of range of motion can be used to establish a limitation of use.[13] An unspecified percentage or degree of restricted range of motion is not enough.[14] This requirement relates to the medical significance of the claimed limitation of use. The analysis involves a comparative determination of the degree or qualitative nature of the limitation based on the normal function, purpose, and use of the affected body part.[15] In other words, a medical expert must describe the qualitative nature of the plaintiff's limitation based on the normal function, purpose, or use of the plaintiff's affected body part.[16]

As to the causation element, it will be necessary for the plaintiff to establish this element by expert opinion, namely, that the specified degree or percentage of loss of range of motion or limitations in plaintiff's physical activities are a natural and expected medical consequence of plaintiff's injuries, which injuries are demonstrated by competent medical proof.[17]

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[12] *Lopez v. Senatore*, 65 NY2d 1017 [1985]; *Lanuto v. Constantine*, 192 AD2d 989 [3d Dept 1993]; *Decker v. Rassaert*, 131 AD2d 626 [2d Dept 1987].

[13] *Toure v. Avis Rent a Car Systems*, 98 NY2d 345 [2002]; *Molina v. Nosa Choi*, 298 AD2d 508 [2dDept 2002].

[14] *Herman v. Church*, 276 AD2d 471 [2d Dept 2000]; *Barbarulo v. Allery*, 271 AD2d 897 [3d Dept 2000]; *Owens v. Nolan*, 269 AD2d 794 [4th Dept 2000].

[15] *Route v. Avis Rent A Car System*, 98 NY2d at 353, *supra*.

[16] *Id.* at 355.

[17] *Toure v. Avis Rent A Car System*, 98 NY2d at 353, 355, *supra*.

When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims.[18]

The plaintiff submits the sworn affidavit of Dr. David Abrams, a chiropractor, who bases his diagnosis on history taken from the patient, testing he performed, and the MRI reports of Dr. Bhim S. Nangia. The sworn affidavit maintains that the plaintiff saw Dr. Abrams shortly after his accident, on December 8, 2006, on April 11, 2007, and November 7, 2008. During the plaintiff's last visit, Dr. Abrams found a deficit of 12% in the plaintiff's back forward flexion, a 20% deficit in the plaintiff's back extension, and a deficit of 20% in the plaintiff's left and right lateral binding. Dr. Abrams established that the plaintiff sustained lumbar disc bulges at the L3-L4, L4-L5 and L5-S1 levels, and left lumbar radiculopathy at the L5-S1 level. He further concluded that these injuries are a direct result of the accident that occurred on December 5, 2006. Finally, Dr. Abrams stated that these conditions are permanent and disabling in nature as the plaintiff has been restrained from performing certain activities like lifting, carrying, pulling, pushing, learning, and bending. At the presentation of this evidence, the plaintiff raises at least an issue of fact regarding the nature of his injury.

Conclusion

The defendants' motion for summary judgment is denied. A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact.[19] Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing

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[18] *Toure v. Avis Rent A Car System*, 98 NY2d at 353

[19] *CPLR* §3212[b].

contentions must be viewed in a light most favorable to the party opposing the motion."[20] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[21] Here, there is an issue of fact as to whether or not the plaintiff has suffered a "serious injury" as defined in *Insurance Law* §5102(d)

Accordingly, it is hereby:

ORDERED, that the defendants' motion to dismiss the plaintiff's complaint is denied in its entirety; and it is further

ORDERED, that the remaining parties shall return to DCM Part 3 on **March 12, 2009 at 9:30 A.M.** for a Compliance Conference.

ENTER,

DATED: January 26, 2009

Joseph J. Maltese
Justice of the Supreme Court

[20] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2nd Dept 1990].

[21] *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

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