

Cirillo v Depeel

2011 NY Slip Op 30718(U)

March 10, 2011

Sup Ct, Suffolk County

Docket Number: 08-36993

Judge: John J.J. Jones Jr

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By her bill of particulars, Cheryl Cirillo alleges that she sustained various personal injuries as a result of the subject accident, including a tear of the anterior horn lateral meniscus of the left knee; left knee internal derangement; traumatic parameniscal cyst of the left knee; edema of the adjacent infrapatellar fat pad of the left knee; traumatic patellar chondromalacia of the left knee; joint effusion of the left knee; left shoulder tendonitis; internal derangement of the cervical and thoracic spines; cervical and thoracic myofascial pain with radiculitis; and post traumatic headaches. Cheryl alleges that as a result of the accident she suffered an exacerbation of prior injuries to her left knee, neck and back. Cheryl Cirillo further alleges that she was incapacitated from her employment with Suffolk County for approximately three months immediately following the accident, and intermittently thereafter. At the time of the accident, Cheryl Cirillo was receiving workman's compensation, because of injuries she sustained to her neck, left elbow, left shoulder, left ankle, left foot, back, and left knee as a result of a slip and fall in the parking lot at work.

Additionally, by his bill of particulars, Paul-Michael Cirillo alleges that he sustained various personal injuries as a result of the accident, including internal derangement of the lumbosacral spine; compromised disc at level L5/S1; internal derangement of the right knee, cervical spine, and lower extremity; and hamstring and right shoulder sprain/strain. Paul-Michael Cirillo alleges that he missed approximately one week from school and was unable to participate in gym class or sports activities for approximately four months following the accident. By her bill of particulars, Brianna Cirillo alleges that she sustained various personal injuries as a result of the accident, including internal derangement of the cervical spine and left shoulder; straightening of the cervical lordosis; and cervical radiculopathy. Brianna Cirillo alleges that she missed intermittent dates of school, was unable to fully participate in gym class for approximately two to four weeks, was partially restricted from gym class for approximately two months thereafter, and was unable to participate in dance class/team sports activities for approximately nine months following the accident. By her bill of particulars, Tatiana Cirillo alleges that she sustained various personal injuries as a result of the subject accident, including internal derangement of the lumbosacral spine, cervical spine, right shoulder, and knees; and radiculopathy of the lumbosacral spine. Tatiana Cirillo alleges that she missed intermittent days from school and was unable to participate in gym class for approximately two to four weeks following the accident.

Defendants now move for summary judgment on the basis that the injuries plaintiffs' allegedly sustained as a result of the accident do not come within the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendants submit a copy of the pleadings, a copy of the plaintiffs' deposition transcripts, and the sworn medical reports of Dr. Stanley Ross. Dr. Ross, at defendants' request, conducted independent orthopedic examinations of plaintiffs Cheryl Cirillo, Brianna Cirillo, Tatiana Cirillo, and Paul-Michael Cirillo on December 14, 2009. Plaintiffs oppose the motion on the ground that defendants have failed to meet their prima facie burden that the injuries sustained by plaintiffs as a result of the accident did not come within the meaning of the "serious injury" threshold requirement of Insurance Law § 5102(d). Alternatively, plaintiffs assert that the evidence submitted in opposition demonstrates that each of them sustained an injury within either the "limitations of use" categories or the "90/180 days" category. In opposition to the motion, plaintiffs submit sworn medical reports of Dr. Ahmed Elfiky, a copy of the police motor vehicle accident report, excerpts of plaintiffs' deposition transcripts, and the unsworn medical report of Dr. Barbara Moriarty. Plaintiffs also submit the sworn medical reports of Dr. Pradeep Albert and Dr. Stephen Hershowitz.

It has long been established that the “legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (*Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]; see also *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a “serious injury” is to be made by the court in the first instance (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [1984], *aff’d* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a “serious injury” as “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.”

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for “serious injury” under New York’s No-Fault Insurance Law (see *Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [2003]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). However, if a defendant does not establish a prima facie case that the plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff’s opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2005]; see generally, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants have established their prima facie burden that plaintiff Cheryl Cirillo did not sustain a “serious injury” within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, *supra*; *Licari v Elliott*, *supra*; *Guzman v Joseph*, 50 AD3d 741, 855 NYS2d 638 [2008]). Dr. Stanley Ross, in his medical report, states, in pertinent part, that an examination of plaintiff Cheryl Cirillo’s cervical spine reveals that she exhibits flexion of 50 degrees (normal is 50 degrees), extension of 60 degrees (normal is 60 degrees), right and left lateral flexion of 45 degrees (normal is 45 degrees), and right and left rotation of 80 degrees (normal is 80 degrees). It states that an examination of plaintiff’s thoracic spine reveals no paraspinous spasm or tenderness upon palpation. The report states that

an examination of plaintiff's left shoulder reveals that she exhibits forward flexion of 180 degrees (normal is 180 degrees), extension of 50 degrees (normal is 50 degrees), abduction of 180 degrees (normal is 180 degrees), adduction of 50 degrees (normal is 50 degrees), and internal and external rotation of 90 degrees (normal is 90 degrees). The report states that an examination of plaintiff's left knee reveals that there is no heat, swelling, effusion, erythema, or crepitus observed. It states that she has flexion of 110 degrees (normal is 110 degrees) and extension of 0 degrees (normal is 0 degrees) in her left knee. Dr. Ross opines that the cervical, thoracic, left shoulder, and left knee sprains/contusions that plaintiff sustained as a result of the subject accident have all resolved, and that there is no evidence of an orthopedic disability that relates to the accident.

Additionally, defendants, through the submission of plaintiffs' deposition testimonies, and the report of their expert orthopedist, established their prima facie entitlement to judgment as a matter of law that neither plaintiff Paul-Michael Cirillo, nor infant plaintiffs Brianna Cirillo or Tatiana Cirillo sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Pommells v Perez, supra; DeJesus v Cruz*, 73 AD3d 539, 902 NYS2d 503 [2010]; *Lopez v Adul-Wahab*, 67 AD3d 598, 889 NYS2d 178 [2009]; *DeJesus v Paullino*, 61 AD3d 605, 878 NYS2d 20 [2009]). Dr. Ross in his medical report, states, in relevant part, that an examination of Brianna Cirillo's cervical spine reveals that she exhibits flexion of 50 degrees (normal is 50 degrees), extension of 60 degrees (normal is 60 degrees), right and left lateral flexion of 45 degrees (normal is 45 degrees), and right and left rotation of 80 degrees (normal is 80 degrees). It states an examination of infant plaintiff's left and right shoulders reveals that she has full ranges of motion in those areas, and that there is no heat, swelling, effusion, erythema, or crepitus. Dr. Ross opines that the cervical spine and bilateral shoulder sprains/strains that she sustained as a result of the subject accident have all resolved, and that there is no evidence of an orthopedic disability.

Likewise, Dr. Ross in his medical report, states, that an examination of Paul-Michael Cirillo's cervical spine reveals that he exhibits flexion of 50 degrees (normal is 50 degrees), extension of 60 degrees (normal is 60 degrees), right and left lateral flexion of 45 degrees (normal is 45 degrees), and right and left rotation of 80 degrees (normal is 80 degrees). It states that an examination of plaintiff's lumbar spine reveals that he exhibits flexion of 60 degrees (normal is 60 degrees), extension of 25 degrees (normal is 25 degrees), right and left lateral bending of 25 degrees (normal is 25 degrees). It states that plaintiff's straight leg raising test was negative, bilaterally. The report states that an examination of plaintiff's right shoulder and knee reveals that he has full ranges of motion, and that there is no heat, swelling, effusion, erythema, or crepitus. Dr. Ross opines that the cervical, lumbar, right shoulder and right knee sprains/strains that plaintiff sustained as a result of the subject accident have all resolved, and that there is no evidence of any orthopedic disability.

Similarly, Dr. Ross in his medical report, states, that an examination of Tatiana Cirillo's cervical spine reveals that she exhibits flexion of 50 degrees (normal is 50 degrees), extension of 60 degrees (normal is 60 degrees), right and left lateral flexion of 45 degrees (normal is 45 degrees), and right and left rotation of 80 degrees (normal is 80 degrees). It states that an examination of her lumbar spine reveals that she exhibits flexion of 60 degrees (normal is 60 degrees), extension of 25 degrees (normal is 25 degrees), right and left lateral bending of 25 degrees (normal is 25 degrees). It states that infant plaintiff's straight leg raising test was negative, bilaterally and that her gait is normal. The report states that an examination of her right shoulder, right and left knees shows that she exhibits full ranges of motion in those areas, and that there is no tenderness upon palpation, or heat, swelling, or erythema. Dr. Ross opines that the cervical, lumbar,

right shoulder, and bilateral knee sprains/strains that she sustained as a result of the subject accident have all resolved, and that there is no evidence of an orthopedic disability.

Therefore, the burden shifted to plaintiffs to raise a triable issue of fact as to whether they sustained a serious injury (*see Gaddy v Eycler, supra; Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 [2005]; *McLoyrd v Pennypacker*, 178 AD2d 277, 577 NYS2d 272 [1991]). A plaintiff must demonstrate a total loss of use of a body organ, member, function or system to recover under the “permanent loss of use” category, (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). “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 the body part” (*Dufel v Green, supra at 798; see Toure v Avis Rent A Car Sys., supra*). Therefore, in order for a plaintiff to prove the extent or degree of physical limitation under the “permanent consequential limitation of use of a body organ or member” or the “significant limitation of use of a body function or system” category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2009]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2005]). A sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part may also suffice (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Dufel v Green, supra*). Furthermore, a plaintiff alleging injury within the “limitation of use” categories who ceases treatment after the accident must provide a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see Ferebee v Sheika*, 58 AD3d 675, 873 NYS2d 93 [2009]; *Besso v DeMaggio*, 56 AD3d 596, 868 NYS2d 681 [2008]).

In opposition, plaintiffs failed to raise a triable issue of fact to refute defendants’ prima facie showing that they did not sustain a serious injury as a result of the accident (*see Gaddy v Eycler, supra; Licari v Elliott, supra; Ali v Khan*, 50 AD3d 454, 857 NYS2d 71 [2008]; *Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 [2005]; *McLoyrd v Pennypacker*, 178 AD2d 277, 577 NYS2d 272 [1991]). The plaintiffs have proffered insufficient medical evidence to demonstrate that they sustained an injury within the “limitation of use” categories (*see Licari v Elliott, supra; Ali v Khan*, 50 AD3d 454, 857 NYS2d 71 [2008]), or within the “90/180” category (*see Jack v Acapulco Car Serv., Inc.*, 63 AD3d 1526, 897 NYS2d 648 [2010]; *Bleszcz v Hiscock*, 69 AD3d 639, 894 NYS2d 481 [2010]; *Nguyen v Abdel-Hamed*, 61 AD3d 429, 877 NYS2d 26 [2009]; *Kuchero v Tabachnikov*, 54 AD3d 729, 864 NYS2d 459 [2008]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2000]). The term “significant” limitation must be construed as more than a minor limitation of use (*see Licari v Elliott, supra; Leschen v Kollarits*, 144 AD2d 122, 534 NYS2d 233 [1988]; *Gootz v Kelly*, 140 AD2d 874, 528 NYS2d 446 [1988]).

The medical report of Dr. Ahmed Elfiky states that he initially examined plaintiff Cheryl Cirillo on October 10, 2005, and then re-examined her on April 12, 2010. Dr. Elfiky’s report on Cheryl Cirillo fails to address any of the prior injuries plaintiff sustained to her cervical and lumbar regions, and how, in light of her past medical history, plaintiff’s current medical problems are causally related to the subject accident (*see Style v Joseph*, 32 AD3d 212, 214, 820 NYS2d 26 [2006]). Once a defendant presents evidence of a pre-existing injury, it is incumbent upon the plaintiff to present proof to address the defendant’s lack of

causation (*see Sky v Tabs*, 57 AD3d 235, 868 NYS2d 648 [2008]; *Carter v Full Serv., Inc.*, 29 AD3d 342, 815 NYS2d 41 [2006]; *Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [2006]). In view of this omission, Dr. Elfiky's conclusion that Cheryl Cirillo's condition is causally related to the subject accident is mere speculation and insufficient to defeat defendants' motion for summary judgment (*see Pommells v Perez*, *supra*; *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Rodriguez v Abdallah*, 51 AD3d 590, 858 NYS2d 169 [2008]).

Furthermore, Dr. Elfiky states that he initially examined plaintiff Paul-Michael Cirillo and infant plaintiffs Tatiana and Brianna Cirillo in October 2005, and that he re-examined each plaintiff in April 2010. Although Dr. Elfiky opines that Paul-Michael Cirillo has an L5/S1 central disc protrusion with radiculitis, the mere existence of a herniated or bulging disc, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Sharma v Diaz*, 48 AD3d 442, 443, 850 NYS2d 634 [2008]; *see Mejia v De Rose*, 35 AD3d 407, 825 NYS2d 722 [2006]; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2006]). Moreover, Dr. Elfiky's report fails to demonstrate that plaintiffs showed a significant limitation of motion in their cervical or lumbar regions contemporaneous with the subject accident (*see Stevens v Sampson*, 72 AD3d 793, 898 NYS2d 657 [2010]; *Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2010]; *Rivera v Bushwick Ridgewood Prop. Inc.*, 63 AD3d 712, 880 NYS2d 149 [2009]). Additionally, Dr. Elfiky's report is deficient, in that it fails to state what objective test or tests he performed during his examinations of plaintiff and infant plaintiffs to quantify their range of motion restrictions (*see Giammalva v Winters*, 59 AD3d 595, 873 NYS2d 277 [2009]; *Tolstocheev v Barjrovic*, 28 AD3d 473, 811 NYS2d 785 [2006]; *Gamberg v Romeo*, 298 AD2d 525, 736 NYS2d 64 [2001]).

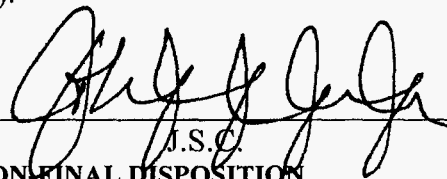
Moreover, plaintiffs and their expert failed to explain the extensive gap between the time they stopped treatment and their most recent examinations on April 12, 2010 (*see Pommells v Perez*, *supra*; *Garcia v Lopez*, *supra*; *Berkas v McMillian*, 40 AD3d 563, 835 NYS2d 388 [2007]). Furthermore, plaintiffs failed to submit competent medical evidence demonstrating that the injuries they sustained prevented them from performing substantially all of their usual or customary activities for not less than 90 days of the first 180 days following the subject accident (*see Rabolt v Park*, *supra*; *Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535, 846 NYS2d 613 [2007]; *Nociforo v Penna*, 42 AD3d 514, 840 NYS2d 396 [2007]; *Felix v New York City Tr. Auth.*, 32 AD3d 527, 819 NYS2d 835 [2006]; *Sainte-Aime v Ho*, *supra*). Accordingly, defendants' motion for summary judgment is granted.

In light of the determination that plaintiffs did not sustain a serious injury as a result of the subject accident, plaintiffs' cross motion for partial summary judgment on the issue of liability is denied, as moot (*see Pagano v Vanness*, 1 AD3d 419, 766 NYS2d 908 [2003]).

Dated: 10 March 2011

FINAL DISPOSITION

NON-FINAL DISPOSITION


 J.S.C.