

**Wilkins v Progressive Corp.**

2011 NY Slip Op 31523(U)

June 9, 2011

Supreme Court, Wayne County

Docket Number: 67440/2010

Judge: Daniel G. Barrett

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This opinion is uncorrected and not selected for official publication.

At a term of the Supreme Court held in and for the County of Wayne at the Hall of Justice is Lyons, New York on the 18<sup>th</sup> day of May, 2011.

Present: Honorable Daniel B. Barrett  
Acting Supreme Court Justice

STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

DONALD E. WILKINS and  
DREMA K. WILKINS,  
Plaintiffs

DECISION  
Index No. 67440

-vs-

2010

THE PROGRESSIVE CORPORATION  
and PROGRESSIVE NORTHEASTERN  
INSURANCE COMPANY,  
Defendants

On his way to work on June 10, 2006, the Plaintiff's vehicle, stopped at a red light, was catapulted into the intersection some twenty to thirty feet by another vehicle. The name of the owner and driver of the offending vehicle was never revealed to the Plaintiff. This unidentified driver disentangled his vehicle from the Plaintiff's vehicle and exited the accident scene never to be seen again.

The Plaintiff complained of neck, knee and brain injury stemming from this event. His knee was surgically repaired and he had a number of office visits and some diagnostic tests relative to the complained brain injury. The Plaintiff's carrier, the Defendant, has paid for all medical

treatments relative to the accident pursuant to the no-fault coverage.

In addition, the Plaintiff had in effect SUM Coverage issued from the Defendant. The Defendant has refused Plaintiff's request for payments under the SUM Coverage and so this action was commenced. In this application the Plaintiff is seeking an Order awarding summary judgment on the issues of liability, serious injury, and the applicability of SUM Coverage. Alternatively, the Plaintiff seeks an Order compelling the Defendant to produce certain witnesses involved in handling the no fault claim.

The Defendant cross moved for a protective order precluding the Plaintiff's from deposing representatives of the Defendant regarding the handling of the no-fault claim and an Order dismissing the Plaintiff's claim for failure to satisfy the no fault threshold.

The party moving for summary judgment has the initial burden of setting forth evidentiary facts that establish its cause of action or defense sufficiently to entitle him to judgment as a matter of law. *Rhranek v. United Methodist Homes of Wyoming Conference*, 27 A.D. 3d 879, 810 N.Y.S. 2d 544 (3rd Dept. 2006). Anything less requires denial of the motion, even if the opposing parties' papers do not raise a triable issue of fact. *JMD Holding Corp. v. Congressional Financial Corp.*, 4 N.Y. 3d 373, 795 N.Y.S. 2d 502 (2005).

At the outset, the Court finds that the driver of the offending vehicle is negligent and for purposes of this action negligence is established.

The Plaintiff requests that since the Defendant has paid all of the

medical bills stemming from the accident through the no-fault coverage, that this Court should rule that the issue of proximate cause and serious injury should be adjudicated in favor of Plaintiff. Thus leaving only the issues of damages for the trier of fact. This theory is original as none of the reported cases deal with the facts directly on point. As set forth in *Dermatossian v. City Transit Authority*, 67 N.Y. 2d 219, 492 N.E. 2d 1200, 501 N.Y.S. 2d 784, at page 225 "...if an insurer's conduct in paying a no-fault claim could be deemed an admission in the claimant's subsequent action for damages, an insurer would have to choose between two courses of action, both potentially harmful: either pay the no-fault claim and risk having the fact of payment held against it later as a concession on some point in issue such as the extent of the injury, or its causal connection to the accident - or dispute the claim and subject itself to the arbitration process with attendant expense and delay and the risk of being bound by an adverse arbitral ruling in a subsequent personal injury lawsuit... In sum, strong policy considerations militate against permitting proof of claimant's receipt of first-party benefits for an injury covered by a no-fault insurance as bearing on a material point in issue in the ensuing lawsuit to recover damages for those injuries."

Based on the foregoing the Court denies the Plaintiff's request for an adjudication of liability on its novel theory.

Standing alone, as conceded in oral argument, the neck injury does not satisfy the no-fault threshold. The Plaintiff's request for summary judgment on this injury is denied.

The Court is barred from finding the surgically corrected knee satisfies the no fault threshold due to the defense doctor's affidavit which

indicates, contrary to the treating doctor, the injury was not of a traumatic origin. These contradictory opinions require resolution by the trier of fact.

The Plaintiff is also seeking summary judgment on the issue of serious injury relative to the brain injury. The Plaintiff submitted the affidavits and reports of Dr. Tolomeo regarding the brain injury. In order to substantiate the brain injury, Dr. Tolomeo relied upon the cognitive evaluation performed by Geriann Jackson, M.S., CCC- SLP. The test and written evaluation of Ms. Jackson were unsworn. It is not permissible for Plaintiff's doctor to rely upon unsworn reports of others. *Mahony v. Zerillo*, 6 A.D. 3d 403, 744 N.Y.S. 2d 378 (2<sup>nd</sup> Dept. 2004).

The Defendant has moved for summary judgment. It has the burden of proving the Plaintiff's injuries were not serious. In order for Defendant to establish that the Plaintiff failed to sustain a serious injury within the meaning of the statute, the Defendant must submit affidavits or affirmations of medical experts who examined the Plaintiff and opined that no objective medical findings support Plaintiff's claim. *Grossman v. Wright*, 268 A.D. 2d 79, 707 N.Y.S. 2d 233 (2<sup>nd</sup> Dept. 2000). The Defendant submitted such an affidavit regarding the knee injury but there was no such expert submission regarding the brain injury. Since the Defendant did not meet its burden to establish that the Plaintiff did not suffer a serious injury, the Plaintiff is not obligated to come forward with proof to defeat the Defendant's motion.

The Plaintiff has requested depositions of representatives of the no fault department and Defendant has moved for a protective order barring their depositions. Based on the submissions there is no indication Defendant did anything except review the medical records provided by the

Plaintiff's treating doctors. The Defendant did not do any independent medical testing. Since these medical records are readily available to the Plaintiff, the Court will grant the Defendant a protective order precluding the deposition of the Defendant's no-fault witnesses.

The foregoing constitutes the Decision of the Court.

Dated: June 7 2011  
Lyons, New York



Daniel G. Barrett  
Acting Supreme Court Justice

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SUPREME AND COUNTY COURT