

**Lildharrie v Holmes**

2011 NY Slip Op 31794(U)

June 27, 2011

Supreme Court, Suffolk County

Docket Number: 08-41700

Judge: W. Gerard Asher

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SHORT FORM ORDER

INDEX No. 08-41700  
CAL. No. 10-01892MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 32 - SUFFOLK COUNTY

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 2-23-11 (#003)  
MOTION DATE 2-4-11 (#004)  
ADJ. DATE 4-6-11  
Mot. Seq. # 003 - MotD  
# 004 - MotD

-----X

EMILY LILDHARRIE, SEAN LILDHARRIE,  
AN INFANT UNDER THE AGE OF EIGHTEEN  
YEARS OLD BY HIS MOTHER AND  
NATURAL GUARDIAN, EMILY LILDGARRIE  
AND SHAYNA LILDHARRIE, AN INFANT  
UNDER THE AGE OF EIGHTEEN YEARS  
OLD BY HER MOTHER AND NATURAL  
GUARDIAN EMILY LILDHARRIE,  
Plaintiffs,

- against -

JEANETTE HOLMES, SCOTT D. HOLMES, JR.  
AND ESHRI V.B. LILDHARRIE,  
Defendants.

-----X

**Action No. 1**  
Index No. 08-41700

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-----X

SCOTT HOLMES, JR.,  
Plaintiff,  
:  
:  
- against -  
:  
:  
ESHRI LILDHARRIE,  
Defendant.  
:  
-----X

**Action No. 2**  
Index No. 09-29587

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Upon the following papers numbered 1 to 15 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; 5 - 8; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 9 - 11 ; Replying Affidavits and supporting papers 12 - 13, 14 - 15; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motions (003, 004) are consolidated for the purpose of this determination; and it is further

**ORDERED** that the motion (003) by defendants Jeanette Holmes and Scott D. Holmes, Jr., for summary judgment dismissing the first and third causes of action is granted to the extent that the first cause of action is dismissed and is otherwise denied; and it is further

**ORDERED** that the motion (004) by defendant Eshri V. B. Lildharrie for summary judgment dismissing the first and third causes of action is granted to the extent that the first cause of action is dismissed and is otherwise denied.

In this negligence action, plaintiff Emily Lildharrie, individually, and as mother and natural guardian of the infant plaintiffs Sean Lildharrie and Shayna Lildharrie, seeks damages individually and on behalf of the infant plaintiffs for allegedly sustaining personal injuries in a motor vehicle accident on June 13, 2008. Plaintiff alleges that Eshri V. B. Lildharrie, the owner and operator of the vehicle in which she and the infant plaintiffs were passengers, failed to yield to a vehicle owned by defendant Jeanette Holmes and operated by defendant Scott D. Holmes, Jr. ("the Holmes defendants"). The accident occurred at the intersection of County Road 16 and Granny Road in the Town of Brookhaven, New York. The complaint alleges in the first cause of action that the infant plaintiff, Sean Lildharrie, sustained a serious injury, and in the third cause of action that the infant plaintiff, Shayna Lildharrie, sustained a serious injury.

In the bill of particulars, plaintiff alleges that Sean Lildharrie sustained the following injuries: herniated disc at C3/4, left shoulder tendinosis/tendinopathy, post traumatic headaches and dizziness, numbness and tingling of the hands and feet, post concussive syndrome, loss of consciousness, muscle spasms in the cervical, lumbar and thoracic paravertebral muscles, and first degree burns of the face. Sean was transported by ambulance to Stony Brook University Hospital ("Stony Brook"), where he was treated and released. He was confined to bed and home for one day immediately following the accident. Plaintiff alleges that Sean is partially disabled to date.

In the bill of particulars, plaintiff also alleges that the infant plaintiff, Shayna Lildharrie, sustained the following injuries: herniated disc at C4/5, laceration to the lower right leg which required sutures, post traumatic headaches and dizziness, numbness and tingling in the hands and feet, post concussive syndrome, cervical spine strain/sprain, lumbar spine strain/sprain, derangement of the right shoulder, and muscle spasms in the cervical, and lumbar paravertebral muscles. Shayna was transported by ambulance to Stony Brook and was treated and released. She was confined to bed and home for one day immediately following the accident. Plaintiff alleges that Shayna is partially disabled to date.

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The Holmes defendants and defendant Eshri Lildharrie now move separately for summary judgment dismissing the first and third causes of action on the grounds that neither Sean Lildharrie nor Shayna Lildharrie sustained serious injuries within the meaning of New York Insurance Law §5102 (d).

Procedurally, by order dated January 21, 2010, this Court granted a motion to join the instant action (Action 1) with a related action, captioned Scott D. Holmes, Jr. v Eshri V.B. Lildharrie, Index No. 29557/09 (Action 2). The instant motions request relief in Action 1 only.

Under Insurance Law § 5102 (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 proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

A defendant can establish that the 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 (*Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). Once defendant has met the burden, the burden shifts to the plaintiff to demonstrate with competent proof that he sustained a serious injury within the meaning of the No-Fault Insurance Law (*Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]).

In support of the motions, defendants submit, *inter alia*, the pleadings, the bill of particulars, affirmed reports by Hilton C. Adler, M.D., Chandra M. Sharma, M.D., Alan J. Zimmerman, M.D., and Stephen W. Lastig, M.D., and the deposition testimony of the infant plaintiffs. The Court notes that defendant Lildharrie submits identical exhibits as the Holmes defendants in support of his motion.

With regard to whether Sean Lildharrie sustained a serious injury, Dr. Adler, a plastic surgeon, avers that he performed an independent medical examination on May 4, 2010. He states that his examination of the face, mouth, sub-mental neck and anterior neck reveals no evidence of visible scarring or alterations in pigmentation. All regions are non-tender. He found no disability. Dr. Sharma, a psychiatrist and neurologist, performed an independent neurological examination of Sean Lildharrie on

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May 19, 2010. He measured the infant's range of motion in the cervical and lumbar spines, compared his findings to normal ranges, and concluded that there were no limitations in motion. He also stated that Sean's movements in the shoulders were normal. He concluded that the examination was normal. Dr. Zimmerman avers that he performed an independent orthopedic examination on May 19, 2010. He used a goniometer to measure the range of motion in the shoulders, cervical spine and lumbar spine, compared his measurements to normal ranges and concluded that there were no limitations. He concluded that the examination was normal and that Sean had no disability.

Sean testified to the effect that he was not paying attention to the road while a passenger in his father's car on the date of the accident. He did recall that he was seated in the front passenger side, and that the passenger side of their vehicle was struck by defendants' vehicle. One week after the accident, he presented to a chiropractor, who treated him for a few months. He was referred by the chiropractor to physical therapy which he attended for a few months. He received hot packs and massage therapy. He stopped going when the insurance company denied payments. Sean further testified that he continues to have some pain in the shoulders and neck. He states his ability to swim has been affected, and he is unable to lift weights, bend over, and lift things from the floor as well as he did before the accident.

Dr. Lastig avers that he performed a radiologic review of Sean's MRI of the cervical spine. He read the MRI films of the cervical spine performed on August 11, 2008 and opines that there were no focal disc herniations or annular bulges. He found the study to be unremarkable and that there were no findings in the study which are causally related to the accident of June 13, 2008.

Turning to whether the infant plaintiff Shayna Lildharrie sustained a serious injury, Dr. Sharma avers that he conducted an independent neurological examination of her on May 19, 2010. He measured the range of motion in the cervical and lumbar spines, compared his findings to normal ranges, and concluded that there were no limitations. He also performed objective tests which were negative. He concludes that Shayna sustained a healed laceration of the right shin, and that the neurological examination was normal. Dr. Zimmerman avers that he performed an independent orthopedic examination of Shayna on May 19, 2010. He used a goniometer to measure the range of motion in her spine and shoulders. He compared his findings to normal ranges, and concluded that there were no limitations. He also states objective tests were negative. Dr. Zimmerman concludes that there is no disability and that the examination of Shayna was normal.

At her deposition, Shayna testified to the effect that she was seated behind her father, who was driving, in the vehicle at the time of the accident. After the accident, she presented to a chiropractor and treated for a few months. She received manipulations of her back and massage to the shoulders. She also went to physical therapy for approximately six months until the insurance payments stopped. She received heat packs to the shoulders and back and learned exercises to perform at home. After the accident she was unable to swim and run as well as she did before the accident.

The Court finds that defendants have demonstrated their prima facie entitlement to judgment as a matter of law by establishing that the infant plaintiffs have not sustained serious injuries (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352, 746 NYS2d 865 [2002]). The burden of proof shifts to plaintiff to produce evidentiary proof in admissible form sufficient to establish material issues of fact

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which require a trial of the action (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]).

In opposition, plaintiff submits, *inter alia*, the affirmed report of Jeffrey Perry, D.O., the separate personal affidavits of plaintiff, Sean and Shayna, and affirmations of Samuel Mayerfield, M.D., and Robert Diamond, M.D.

Plaintiff failed to raise a triable issue of fact in opposition to the defendants' showing that Sean did not sustain a serious injury (*see, Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). Although Drs Mayerfield and Diamond noted a cervical disc herniation and left shoulder supraspinatus tendinosis and tendinopathy, such injuries do not, in and of themselves, constitute serious injuries (*see, Kahn v Dominques*, 288 AD2d 349, 734 NYS2d 459 [2d Dept 2001]). Here, Dr. Perry failed to provide initial range of motion measurements and failed to identify the objective tests that were performed to measure the alleged range of motion restrictions in his cervical spine, thoracic spine and left shoulder (*Toure v Avis Rent A Car Sys.*, *supra*; *Grossman v Wright*, *supra*). In addition, plaintiff has failed to submit competent medical evidence that Sean was unable to perform substantially all daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*Albano v Onolfo*, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]; *Doran v Sequino*, 17 AD3d 626, 795 NYS2d 245 [2d Dept 2005]). Furthermore, Sean's own subjective complaints in his sworn affidavit, and that of plaintiff, are insufficient under the circumstances to meet the statutory requirement of serious injury (*see, Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]; *Lagana v Shamsian*, 270 AD2d 313, 704 NYS2d 287 [2d Dept 2000]). Therefore, the first cause of action is dismissed.

Plaintiff, however, raised a triable issue of fact with regard to whether Shayna sustained a serious injury by submitting objective evidence of the extent of the alleged physical limitations resulting from her cervical disc injury and its duration, corroborated by a recent examination by Dr. Perry (*Seecoomar v Ly*, 43 AD3d 900, 841 NYS2d 624 [2d Dept 2007]). In his examination, Dr. Perry avers that he examined the infant plaintiff Shayna Lildharrie on August 4, 2008. He measured Shayna's range of motion in the cervical spine, compared his findings to normal ranges, and concluded that there were significant limitations in motion. He also performed an examination of Shayna's right shoulder and noted limitations, yet did not provide measurements or comparisons with normal ranges. He reviewed an MRI of Shayna's cervical spine and noted a disc herniation at C4/5, which he opines is causally related to the accident on June 13, 2008. He states that Shayna treated with him until January 2009, inasmuch as she reached her maximum medical improvement. On February 17, 2011, he reexamined Shayna. He measured the range of motion in the cervical spine and right shoulder, compared the findings to normal ranges, and concluded that Shayna continued to have significant limitations in motion. He avers that the limitations in motion are causally related to the accident of June 13, 2008 and will inhibit her ability to carry out her activities of daily living. He further states that her injuries are permanent. The affidavits by plaintiff and Shayna underscore her limitations which continue to the present time.

Dr. Mayerfield avers that he performed an MRI of Shayna's right shoulder on December 18, 2008. He noted no evidence of rotator cuff tendon or labral tear. He found lateral down sloping of the acromion, a factor predisposing mechanical impingement. He also performed an MRI of Shayna's cervical spine on August 11, 2008, and noted a disc herniation at C4/5.

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The evidence presented by plaintiff raises issues of fact regarding whether Shayna sustained serious injuries in her cervical spine (*Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]; *Lincoln v Johnson*, 225 A.D.2d 593, 639 NYS2d 124 [2d Dept 1996]). Given that issues of fact with respect to at least one aspect of the statutory definition of the term "serious injury" have been raised, it is not necessary to determine whether a prima facie showing of "serious injury" has been made with respect to other aspects of the statutory definition as well (see, *O'Neill v O'Neill*, 261 AD2d 459, 690 NYS2d 277 [2d Dept 1999]).

Accordingly, the motions for summary judgment are granted to the extent that the first cause of action seeking damages for serious injuries allegedly suffered by the infant plaintiff, Sean Lildharrie, is dismissed and are otherwise denied. Plaintiff's first cause of action, dismissed herein, is severed, and plaintiff's remaining causes of action continue.

Dated: June 27, 2011

W. Gerard Atke  
J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION