

<b>Russell v Cornell Univ.</b>
2012 NY Slip Op 33912(U)
May 14, 2012
Supreme Court, Tompkins County
Docket Number: 2009-1389
Judge: Phillip R. Rumsey
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At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Cortland County Courthouse, in the City of Cortland, New York, on the 23<sup>rd</sup> day of March, 2012.

PRESENT: HON. PHILLIP R. RUMSEY  
JUSTICE PRESIDING.

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF TOMPKINS

**MICHELLE D. RUSSELL,**

Plaintiff,

vs.

**CORNELL UNIVERSITY and IRENE LEKSUTIS,**

Defendants.

**DECISION AND ORDER**

Index No. 2009-1389  
RJI No. 2011-0292-C

APPEARANCES:

HOLMBERG, GALBRAITH, VAN HOUTEN & MILLER

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SECRETARY OF THE CORPORATION

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**PHILLIP R. RUMSEY, J. S. C.**

Plaintiff commenced this action to recover for injuries that she allegedly sustained in a low-speed motor vehicle collision which occurred on October 17, 2007 in the parking lot of the Plantations located on the Cornell University campus (hereinafter the accident). Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff opposes the motion and cross-moves for an order (1) permitting her to amend her bill of particulars; (2) for summary judgment on the issue of liability; and (3) precluding defendant's expert, Dr. David Hootnick, from testifying at trial.

Plaintiff claims that she sustained a serious injury to her cervical spine, which ultimately resulted in surgery on September 28, 2009 to fuse the C6-7 vertebrae, constituting a significant limitation of use of a body function or system (see Insurance Law § 5102[d]).<sup>1</sup> In support of their motion, defendants submit the independent medical examination report of Hootnick, who examined plaintiff on October 12, 2011, when he also reviewed plaintiff's medical records and the available diagnostic images (see Affidavit of Valerie Cross Dorn, sworn to February 3, 2012 [Dorn Affidavit], Exhibit F [written report affirmed by Hootnick; herein Hootnick Affirmation]). They also rely on plaintiff's deposition testimony and medical records. Hootnick noted that

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<sup>1</sup> The only category of serious injury claimed by plaintiff is a significant limitation of use to her cervical spine (see amended complaint, ¶ 7). While the bill of particulars does not identify the specific category or categories of serious injury claimed, it identifies plaintiff's injury as "herniated disc, C6-7" (see bill of particulars, ¶ 7[a]). In the affidavit that she submitted in opposition to defendants' motion and in support of her cross-motion, plaintiff identifies her continuing symptoms after the accident as consisting of pain and restricted range of motion only in her "neck and upper back" (see Affidavit of Michelle D. Russell, sworn to February 28, 2012, ¶¶ 11 – 15, 20). At oral argument, plaintiff's counsel confirmed to the court that "significant limitation of use" was the only category of serious injury claimed by plaintiff.

plaintiff had been involved in two previous motor vehicle accidents – both deer-vehicle collisions – one on December 8, 2005 and the second on December 19, 2006. He viewed MRIs of plaintiff's cervical spine taken on (1) February 28, 2007 (approximately six months prior to the accident); (2) May 8, 2008 (approximately seven months after the accident); and (3) February 9, 2009 (approximately seventeen months after the accident). He notes that the MRI taken on February 28, 2007 shows a significant spinal cord impingement at the C6-7 (Hootnick Affirmation, p. 8), and that the two post-accident MRIs do not depict any meaningful changes. (*id.*, p. 15). On physical examination, he found no limitations in plaintiff's cervical spine, specifically noting a full active range of motion and an absence of tenderness (*id.*, pp. 4 – 5). He opined that the spinal fusion surgery was necessitated by the disk protrusion which preexisted the accident – first identified on the MRI of February 28, 2007 – and not as a result of the accident (*id.*, p 15).

“This evidence of a preexisting condition shifted the burden to plaintiff[] to set forth competent medical evidence based upon objective medical findings and tests to support the claim of serious injury and to connect the condition to the accident. Plaintiff[] [was] thus required to provide objective medical proof and quantitative or qualitative evidence establishing plaintiff's claimed condition and distinguishing her preexisting conditions from the claimed injury ”

MacMillan v Cleveland, 82 AD3d 1388, 1388 -- 1389 [2011] [quotation and citations omitted]).

In opposing defendants' motion, plaintiff relies on the affirmation of Dr. William McKenzie and the affidavit of Dr. Randall H. Corey. McKenzie performed an independent medical examination of plaintiff on September 15, 2009. He noted that the pre-accident MRIs showed the existence of a cervical disk herniation at C6-7 causing spinal cord compression. He concluded that the accident exacerbated plaintiff's preexisting condition and caused the

symptoms with which plaintiff presented – including the need for spinal fusion surgery (see Affirmation of William McKenzie, M.D. dated September 15, 2009, pp. 4 – 5). However, inasmuch as his opinion that plaintiff’s symptoms were caused by the accident is based solely on plaintiff’s subjective reports that the cervical pain that she had experienced as a result of her previous injuries had resolved prior to the accident (id., pp. 1, 3, 4), he failed to demonstrate that his opinion regarding exacerbation was “based on anything other than plaintiff’s subjective complaints” (Wolff v Schweitzer, 56 AD3d 859, 862 [2008]). Accordingly, his affirmation is insufficient to show that plaintiff sustained a serious injury.

Corey – a chiropractor – conducted seven independent medical examinations of plaintiff. In considering his opinion, it bears noting that he was retained by an insurance carrier to determine whether plaintiff’s claimed injuries were caused by the accident, and that the insurance carrier would not be responsible for payment without a finding of causation (see MacMillan, 82 AD3d at 1390). Corey notes the existence of pre-accident MRIs showing a herniated disk at C6-7 (see Affidavit of Randall H. Corey, sworn to January 6, 2012 [Corey Affidavit], attached affirmed written reports dated March 26, 2007 and September 24, 2007, each at p. 3). While the opinions expressed in his written reports are hardly a model of clarity, they evince an opinion that the accident was a cause of plaintiff’s neck injury (see e.g. Corey Affidavit, attached affirmed written report dated May 8, 2008, pp. 3 – 4). His opinion is supported by the range of motion tests and orthopedic tests which he conducted at each examination. Notably, his examination of September 13, 2007 – approximately one month prior to the accident – reflected that plaintiff’s cervical extension, flexion, and lateral flexion were all completely normal and that her cervical rotation had improved considerably since the previous examination on March 13, 2007 (left and

right rotation were both 20/80 degrees on March 13; on September 13, left rotation was 45/80 degrees and right rotation was 60/80 degrees). At the first examination he conducted after the accident – on May 8, 2008 – plaintiff’s cervical flexion and extension were reduced to 30/45 degrees, left and right rotations were reduced to 30/80 degrees, and left and right lateral flexion were only 20/30 degrees. Tests performed at each subsequent examination – including the last examination conducted by Corey on February 22, 2011 – continued to show that plaintiff had restricted ranges of motion in her cervical spine (see e.g. Corey Affidavit, attached affirmed written report dated February 22, 2010 [sic] [reporting an examination conducted on February 22, 2011], p. 2). His findings that plaintiff experienced restricted ranges of motion for more than three years are sufficient to permit a finding of significant limitation of use – which need not be permanent (see Preston v Young, 239 AD2d 729, 731 – 732 [1997]) – notwithstanding his determination that plaintiff no longer experiences neck pain (see Corey Affidavit, attached affirmed written report dated February 22, 2010 [sic] [reporting an examination conducted on February 22, 2011], pp. 2 [plaintiff stated that she no longer has neck pain], 3 [orthopedic tests formerly positive for local neck and back pain were positive for only back pain]). Accordingly, viewed in the light most favorable to plaintiff, Corey’s opinion is minimally sufficient to meet her burden of demonstrating the existence of triable issues of fact with respect to her claim to have sustained a serious injury in the form of significant limitation of use to her cervical spine (see MacMillan, 82 AD3d 1388; see also Peterson v Cellery, 93 AD3d 911 [2012]; McCarthy v Perault, 277 AD2d 664 [2000]). Based on the foregoing, defendant’s summary judgment motion must be, and hereby is, denied.

Turning to plaintiff’s cross-motion seeking leave to amend her bill of particulars,

defendant has failed to show prejudice sufficient to require denial of the motion (see e.g. Keeler v Perrino, 85 AD3d 1424 [2011]; Harris v Jim's Proclean Serv., Inc., 34 AD3d 1009 [2006]; Brewer v Weston, 309 AD2d 1088 [2003]). In her original bill of particulars, plaintiff did not specifically claim that any of her injuries were aggravations of preexisting injuries (see demand for verified bill of particulars and bill of particulars, depositions exhibits 3A and 3B, respectively, attached to Dorn Affidavit, Exhibit C [Transcript of Examination Before Trial of Michelle Russell]). She now seeks leave to amend paragraph 12(a) of her bill of particulars to claim that the limitation in the range of motion to her cervical spine is an aggravation of a preexisting injury, and to quantify the degree of claimed restriction – ranging from 33 1/3% – 37 1/2% (see Affidavit of Dirk A. Galbraith, sworn to March 6, 2012, Exhibit A). The proposed amendment does not add any new facts, theories or category of claimed serious injury. The original bill of particulars disclosed the two previous deer-vehicle collisions. Notably, the information regarding the claimed degrees of limited motion are contained in the reports prepared by Corey that have been in defendants' possession for a considerable period of time. In fact, the report prepared by defendants' expert, Hootnick, refers to the restricted ranges of motion identified by Corey (see Hootnick Affirmation, p. 7). His report evidences his awareness that plaintiff had experienced problems with her cervical spine prior to the accident and that she had made claims that the accident exacerbated those symptoms (id., pp. 2, 5 – 9, 14 – 15).

Accordingly, there has been no showing that defendants will be substantially prejudiced by permitting plaintiff to amend her bill of particulars. Her cross-motion seeking leave to do so is granted, and she may serve an amended bill of particulars in the form attached to the Galbraith Affidavit as Exhibit A on or before **June 8, 2012**.

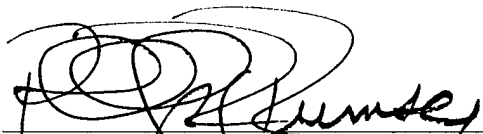
In support of her cross-motion seeking summary judgment on the issue of liability, plaintiff has submitted uncontroverted evidence that defendants' vehicle backed into plaintiff's parked vehicle. Defendants have not alleged that plaintiff's vehicle was unlawfully or negligently parked. While plaintiff is not entitled to summary judgment on the issue of liability – in light of the fact that it has not yet been determined whether she sustained a serious injury – she has shown entitlement to summary judgment that defendants' negligence is the sole cause of the accident (cf. Boehm v Telfer, 250 AD2d 975 [1998]). Accordingly, plaintiff's cross-motion on the issue of liability is granted to the extent of dismissing defendants' second affirmative defense (comparative fault) and awarding summary judgment that defendants negligently caused the accident.

Finally, plaintiff argues that Hootnick should be precluded from testifying at trial about the opinions expressed in his written report, on the basis that his report contains an inadequate factual foundation for those opinions. She specifically alleges that Hootnick's failure to name the diagnostic tests conducted by him during his physical examination, coupled with his reliance on medical reports prepared by other physicians, require that he be precluded from testifying. Plaintiff's argument ignores the facts that Hootnick did, in fact, conduct his own physical examination of plaintiff. Moreover, her cross-motion is premature, because defendants have not yet had the opportunity to establish a proper foundation for Hootnick's trial testimony. In that regard, it is not yet known whether any of the reports on which Hootnick may have relied will be admitted into evidence at trial or whether defendants will establish that he may properly rely on reports not admitted into evidence (see O'Brien v Mbugua, 49 AD3d 937 [2008]; Anderson v Dainack, 39 AD3d 1065 [2007]). Accordingly, plaintiff's cross-motion to preclude Hootnick

from testifying at trial is denied, without prejudice.

This decision constitutes the order of the court. The transmittal of copies of this decision and order by the court shall not constitute notice of entry.

Dated: May 14, 2012  
Cortland, New York



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HON. PHILLIP R. RUMSEY  
Supreme Court Justice

ENTER