

Wehnke v Dean

2015 NY Slip Op 32923(U)

June 1, 2015

Supreme Court, Cortland County

Docket Number: 14-008

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 Tompkins County Courthouse, in the City of Ithaca, New York on the 1st day of May, 2015.

PRESENT: HON. PHILLIP R. RUMSEY
JUSTICE PRESIDING.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND

**ROXANNE WEHNKE and
MICHAEL WEHNKE,**

Plaintiffs,

vs.

BRETT J. DEAN,

Defendants.

DECISION AND ORDER

Index No. 14-008

RJI No. 2015-0010-M

APPEARANCES:

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PHILLIP R. RUMSEY, J. S. C.

Plaintiffs commenced this action to recover for injuries that Roxanne Wehnke (herein plaintiff; her husband sues derivatively) allegedly sustained in a motor vehicle collision which occurred on March 3, 2011 in the Town of Triangle in Broome County, New York. Defendant moves 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 claims that she sustained the following serious injuries, as defined in Insurance Law § 5102(d): (1) significant limitation of use of a body function or system, namely, the cervical, thoracic and lumbar regions of the spine and associated limitations in her extremities; (2) permanent consequential limitation of use of a body organ or member, namely, the cervical, thoracic and lumbar regions of the spine and associated limitations in her extremities; and (3) the inability to perform substantially all of her usual and customary daily activities for more than 90 of 180 days immediately following the accident.¹

In support of his motion, defendant submits the independent medical examination report of Daniel L. Carr, M.D., who examined plaintiff on November 17, 2014, when he also reviewed plaintiff's medical records and the available diagnostic images (see Affirmation of Laura K. Eckman dated December 31, 2014, Exhibit E [written report affirmed by Carr on November 17, 2014; herein Carr Affirmation]). Defendant also submits a transcript of plaintiff's examination before trial (Eckman Affirmation, Exhibit D; herein Plaintiff EBT Transcript).

Defendant's submissions are insufficient to sustain his initial burden of proof with respect to the 90/180-day category of serious injury. Plaintiff testified that her activities were

¹ References herein to permanent injuries shall be deemed to include the first two categories of serious injury identified in this paragraph.

substantially limited by her injuries during the entire 180-day period, specifically, that she: (1) could not go grocery shopping unassisted for nine to ten months following the accident (see Plaintiff's EBT Transcript, pp. 46, 49-50); (2) needed substantial assistance to move into her new home during that time period (id., pp. 7, 46, 51); (3) was unable to continue her practice of working out for one and one-half hours each morning (id., pp. 46, 52-53); (4) could not sit for more than two hours at a stretch for the first six months after the accident (id., p. 57); (5) was unable to perform her normal garden chores (id., p. 61); (6) was unable to perform her normal housecleaning duties (id., pp. 61-62); (7) was unable to golf (id., pp. 47, 53-54); and (8) could no longer maintain her travel schedule for work (id., pp. 12-15). Defendants offered no proof to contradict plaintiff's testimony and Carr's report completely fails to address the 90/180-day category of serious injury. Notably, he "never expressed an opinion about the disabling effect of plaintiff's injuries during that [180-day] period" (Tornatore v Haggerty, 307 AD2d 522, 523 [2003]; see also Lowell v Peters, 3 AD3d 778 [2004]). Accordingly, defendant failed to sustain his initial burden of proof with respect to the 90/180-day category of serious injury.²

Carr's Affirmation is likewise insufficient to satisfy defendant's burden to show that plaintiff has not sustained a serious injury of a permanent nature. Notably, he does not unambiguously opine that plaintiff did not sustain a serious injury as a result of the accident. Carr performed objective range of motion tests and found that plaintiff met or exceeded the normal range of motion for each of the movements tested, except one. In that regard, he noted that plaintiff had lumbar flexion of only 50 degrees, which is 10 degrees, or 16.67 percent, less

² The fact that plaintiff may have continued to work, with accommodations, is not dispositive on the question of serious injury, especially in light of her testimony that she was unable to perform many of the activities that she had routinely enjoyed prior to the accident (see e.g. Sands v Stark, 299 AD2d 642 [2002], citing Judd v Walton, 259 AD2d 1016, 1017 [1999]).

than the minimum normal range of motion of 60 degrees or more (see Carr Affirmation, p. 3). A limitation of that magnitude may constitute a serious injury (see e.g. Garner v Tong, 27 AD3d 401 [2006]; Howard v King, 307 AD2d 278 [2003]). He consistently notes that his review of MRIs taken shortly after the accident indicate that plaintiff was suffering from degenerative disc disease prior to the accident – a condition that could explain plaintiff’s limitations – however, he fails to exclude the possibility that plaintiff’s preexisting degenerative condition was exacerbated by the accident.³ In fact, he appears to suggest just the opposite – that plaintiff’s underlying degenerative disease complicated symptoms causally related to strains caused by the motor vehicle accident. Specifically, in the portion of his report entitled “Assessment,” he states that plaintiff experiences radicular symptoms in her right leg that are “more of a myofascial pain problem from muscle strains complicated by her underlying degenerative disease” (Carr Affirmation, p. 7), and opines that “[t]he strains would be casually related to the motor vehicle accident[;] [t]he degenerative disease is not” (*id.*). Thus, his conclusion that plaintiff’s current symptoms result from muscle strains caused by the motor vehicle accident – even if those strains were complicated by her underlying degenerative disease – is facially inconsistent with his opinion that plaintiff’s current symptoms result from her preexisting condition and that they were neither caused nor exacerbated by the accident (*id.*). Accordingly, his report is insufficient to

³ Plaintiffs’ argument that Carr may not rely on unsworn medical reports is unavailing. A defendant may satisfy his or her prima facie burden on a summary judgment motion by submitting an affirmed report from a doctor who relied upon plaintiff’s medical records and deposition testimony in rendering his opinion (see Anderson v Capital Dist. Transp. Auth., 74 AD3d 1616 [2010], *lv denied* 15 NY3d 709 [2010]; McNamara v Wood, 19 AD3d 921 [2005]; see also Franchini v Palmieri, 1 NY3d 536 [2006]; Tuna v Babendererde, 32 AD3d 574 [2006]). The cases cited by plaintiffs stand for the proposition that a **plaintiff** may not similarly rely on unsworn records or reports (see e.g. Kreimerman v Stunis, 74 AD3d 753 [2010]; Vilomar v Castillo, 73 AD3d 758 [2010]; Dann v Yeh, 55 AD3d 1439 [2008]).

meet defendant's initial burden of demonstrating that plaintiff did not sustain a serious injury of a permanent nature.

Moreover, even assuming that plaintiff had met his prima facie burden of demonstrating that plaintiff did not sustain a serious injury of a permanent nature, plaintiffs' evidence is sufficient to show the existence of a material issue of fact with respect to those categories. Plaintiffs submitted the affirmation of Renee S. Melfi, M.D., who treated plaintiff on numerous occasions. Among other things, Melfi reviewed MRI studies and reports, noted that plaintiff suffered radicular pain in her right leg, and subjected her to objective range of motion tests showing limited lumbar flexion of 40 degrees (reporting 60 degrees as normal) and lumbar extension limited to 10 degrees (reporting 25 degrees as normal) (see Affirmation of Renee S. Melfi, M.D. dated March 9, 2015, ¶ 16). These tests represent limitations of 33.3 percent and 40 percent, respectively. Melfi also acknowledges the possibility that plaintiff's condition could result from preexisting degenerative disc disease and concludes, based in part on the fact that plaintiff had been asymptomatic prior to the accident, that her condition was caused by the accident and qualify as serious injuries as defined in the Insurance Law (id., ¶¶ 16-24).

Based on the foregoing, defendant's motion is denied.

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 (see CPLR 5513).

Dated: June 1, 2015
Cortland, New York

Phillip R.
Rumsey

Digital signed by Phillip R. Rumsey
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HON. PHILLIP R. RUMSEY
Supreme Court Justice

ENTER

The following documents were filed with the Clerk of the County of Cortland:

- Notice of motion dated December 31, 2014.
- Affirmation of Laura K. Eckman dated December 31, 2014, with Exhibits A – E.
- Affirmation of Jeffrey G. Pomeroy, Esq. dated March 10, 2015, with Exhibits A – G.
- Affirmation of Renee S. Melfi, M.D. dated March 9, 2015, with Exhibits A – B.
- Reply affirmation of Jerry Christoforatos dated April 20, 2015.
- Original Decision and Order dated June 1, 2015.