

Turner v Maxwell

2018 NY Slip Op 34270(U)

July 10, 2018

Supreme Court, Orange County

Docket Number: Index No. EF007091/16

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X
WILLIAM TURNER and HELENE TURNER,
Plaintiffs,

- against -

BETH A. MAXWELL,

Defendant.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF007091/16

DECISION AND ORDER

Motion Date: June 6, 2018

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The following papers numbered 1 to 6 were read and considered on a motion by the Defendant, pursuant to CPLR §3212, for summary judgment dismissing the complaint on the ground that the Plaintiffs did not suffer serious injuries within the meaning of section 5102 of the Insurance Law.

Notice of Motion - McCoy-Evans Affirmation- Exhibits A-H	1-3
Affirmation in Opposition- Cole-Hatchard- Exhibits 1-2	4-5
Affirmation in Reply- McCoy-Evans	6

Upon the foregoing papers, it is hereby,

ORDERED that the motion is denied.

Introduction

On January 2, 2015, the Plaintiffs William Turner and Helene Turner were allegedly injured when their vehicle was struck by a vehicle being driven by the Defendant Beth Maxwell that entered an intersection against the light.

The Plaintiffs commenced this action to recover damages for personal injuries.

The Defendant moves for summary judgment dismissing the complaint on the ground that the Plaintiffs did not suffer serious injuries within the meaning of section 5102 of the Insurance Law.

The motion is denied.

Factual Background/Procedural History

In support of her motion, the Defendant submits an affirmation from counsel, Tara J. McCoy-Evans.

McCoy-Evans noted that, in the verified bill of particulars, William Turner alleges that he sustained the following injuries as a result of the accident at issue: a tear in the posterior horn of the medial meniscus of the left knee; a tear in the anterior horn of the lateral meniscus of the left knee; patellofemoral joint chondromalacia of the left knee; an internal derangement of the left knee; sprain/strain of the left shoulder and an internal derangement of the left shoulder. Further, that such injuries are permanent in nature.

McCoy-Evans notes that, at his examination before trial, William Turner testified that he was driving at the time of the accident and that, during the accident, his left knee hit the inside door, his left shoulder and head probably hit the window, and his side air bag deployed (Exhibit E, p. 30). He did not receive any medical attention nor request an ambulance at the accident scene, but did receive medical treatment at St. Luke's Cornwall Hospital later that night (Exhibit E, pp. 37-44). He was discharged that same day and missed two (2) days from work as a result of this accident (Exhibit E, pp 44-48). Once back at work, he was placed on light duty, and could not lift anything over 70 pounds until the end of January 2015 or sometime in February 2015 (Exhibit E, pp. 13-14).

Further, William testified, he was seen at Somers Orthopaedic Surgery & Sports Medicine Group (hereinafter "Somers Orthopaedics") in late January 2015 with complaints of left knee and left shoulder pain, and underwent physical therapy three times per week until May 2015 (Exhibit E, pp. 48-49 and 51).

In addition, William testified, an MRI of his left knee revealed a tear in the left knee, although neither surgery nor injections were recommended (Exhibit E, pp. 50-51).

Prior to the accident, William testified, he had never sustained a injury similar to any claimed in this action (Exhibit E, pp. 55-57).

William also testified that he used to be able to hike 9 to 10 miles, but now could only hike 5 miles. Further, that used to walk his dogs for 3 miles, but now only walk them 1 ½ miles (Exhibit E, pp. 58-60).

McCoy-Evans notes that William underwent an independent orthopedic examination by Robert Hendler M.D.

Dr. Hendler's report indicates that William made complaints of intermittent aches and pains to the left shoulder, but he denied decreased motion or weakness in the shoulder.

Further, that he made complaints of intermittent aches and pains to the left knee, and reported that it had a tendency to buckle, although it did not swell or lock (Exhibit G, p. 2).

Upon examination, she notes, Dr. Hendler found a full range of motion in Williams's shoulders and knees (Exhibit G, pp. 2-3).

Dr. Hendler also took x-rays, which showed mild arthritic change in the acromioclavicular joint of William's left shoulder, but no fractures or dislocations. Further, there was no evidence of any periarticular soft tissue calcifications.

According to Dr. Hendler, the x-ray of the left knee showed the joint spaces to be well maintained, with no evidence of fractures or dislocations. Further, the articular surface of the patella appeared to be free of any arthritic or degenerative change, and there was no evidence of any soft tissue calcifications (Exhibit G, p. 3).

McCoy-Evans notes that it was Dr. Hendler's conclusion that William sustained a contusion to his left knee and left shoulder, which had resolved. Further, he concluded, William's left knee and left shoulder were completely normal, and there was no present disability in either of those areas.

As to Helene Turner, McCoy-Evans notes that the Plaintiffs' Verified Bill of Particulars alleges that she sustained the following permanent injuries as a result of the accident at issue: disc bulges at C4-C5 and C5-C6, epicondylitis to the left elbow, internal derangement to the left elbow, internal derangement to the left shoulder and decreased range of motion to the left shoulder.

Helene does not allege that she was confined to a hospital, a bed or to home following the accident.

At her examination before trial, McCoy-Evans notes, Helene testified as follows:

She was a front seated passenger at the time of the accident (Exhibit F, p. 9). When it occurred, the only part of her body that made contact with the inside of the vehicle was her left knee, which struck the center console (Exhibit F, pp. 14-15). She did not receive any medical attention at the scene nor request an ambulance (Exhibit F, pp. 16-17). However, she received medical treatment later that night at St. Luke's Cornwall Hospital for complaints of pain in her left elbow and neck (Exhibit F, pp. 18-19). Helene did not miss any time from work.

Helene testified that she was also treated at Somers Orthopaedics a week to two weeks following the accident, and received physical therapy two times per week until May 2015 (Exhibit F, pp. 20-21). Physical therapy helped her left elbow, left shoulder and her neck (Exhibit F, pp. 21-22).

Further, she testified, an MRI to her left shoulder revealed no tears, and surgery was not recommended (Exhibit F, p. 22). In addition, that the pain in her left shoulder had ended one year after the accident, but her left elbow still acted up once in a while if it was raining or cold (Exhibit F, p. 24). She testified that she is restricted in lifting her arm straight up in the air for a long period of time and that she can't run, carry groceries with two arms or walk two dogs at one time (Exhibit F, pp. 24-26).

McCoy-Evans notes that Helene also underwent an independent orthopedic examination by Robert Hendler M.D.

Helene made complaints to Dr. Hendler of pain on the left side of her neck, mostly between the neck and the left shoulder area, and pain to her left shoulder and left elbow, depending on her activity level (Exhibit H, p. 2).

Dr. Hendler's examination revealed a full range of motion of the bilateral shoulders, cervical spine and left elbow (Exhibit H, p. 2).

Further, x-rays of Helene's cervical spine showed the overall alignment of the spine was essentially within normal limits. In addition, that there was normal cervical lordosis, but no significant degenerative change, no evidence of any subluxations, fracture or dislocations, and the disc spaces were well maintained.

Dr. Hendler's x-ray of Helene's left shoulder revealed no evidence of any fractures or

dislocations, the joint space was well maintained, and there was no evidence of any periarticular soft tissue calcifications.

Dr. Hendler opined that Helene had sustained a cervical sprain, along with a possible contusion to the left shoulder and left elbow, all of which had resolved. Further, he opined, upon physical examination, Helene's cervical spine, left elbow and left shoulder were found to be completely normal. Thus, he concluded, there was no present disability in either area (Exhibit H, p. 4).

McCoy-Evans argues that the above evidence demonstrates that neither Richard nor Helene suffered a "serious injury" within the meaning of the no-fault law.

In opposition to the motion, the Plaintiffs submit an affirmation from counsel, Stephen J. Cole-Hatchard.

Cole-Hatchard asserts that the accident at issue was significant, and that an MRI revealed that William had suffered both medial and lateral meniscus tears of his left knee as a result of the same.

Similarly, he notes, MRIs revealed that Helene suffers from disc bulges at C4-C5 and C5-C6, and straightening of the cervical lordosis, as well as mild degenerative disc disease. Further, he notes, Helene testified that, as of September 14, 2017, she continued to have trouble lifting, running and doing household chores.

Cole-Hatchard notes that he had appended expert medical reports from Dr. Gabriel L. Dassa, a Board certified orthopedic surgeon.

Dr. Dassa, after examination of William, and review of his MRI results, concluded that William had suffered a left knee tear of the posterior horn of the medial meniscus, and a left knee.

tear of the anterior horn of the lateral meniscus (Exh. 1, p. 1). As a result of the same, he noted, William's left knee had swelled to about 1.75 mm. larger than his right knee, and his range of motion was limited, to wit: the Flexion was 120 degrees, with 140 degrees being normal, which was a 15% loss.

Further, Cole-Hatchard notes, Dr. Dassa opined, to a reasonable degree of medical certainty, that such injuries and limitations were caused by the accident at bar (Exhibit 1, p. 3).

In addition, Dr. Dassa also opined that injuries to William's left shoulder were causally related to the accident. Dr. Dassa concluded that there was "strong clinical evidence of a rotator cuff tear," and objective evidence of persistent orthopedic impairment of William's left shoulder causing substantial range of motion limitations (Exhibit 1, p. 4). Dr. Dassa determined that William suffered objectively measured range of motion restrictions of his left shoulder as expressed by the following numbers, which represent the normal range of motion, the tested range of motion, and the degree of loss: (1) Flexion— 170 degrees/150 degrees/ 12% loss; (2) Abduction— 170 degrees/150 degrees/12% loss; (3) Internal rotation— 60 degrees/40 degrees/33% loss; (4) External rotation— 90 degrees/70 degrees/23% loss; (5) Extension— 30 degrees/10 degrees/67% loss; and (5) Adduction- 40 degrees/20 degrees/50% loss.

Further, Dr. Dassa opined , to a reasonable degree of medical certainty, the injuries and limitations were permanent in nature (Exhibit 1, p. 4).

Similarly, he notes, Dr. Dassa performed a physical exam and reviewed an MRI of Helene's cervical spine. Dr. Dassa's examination found persistent cervical and nerve root compression, as evidenced by a positive Spurling test, and objective evidence of persistent orthopedic impairment of Helene's neck (Exhibit 2, p. 3).

Further, Dr. Dassa's review of Helene's MRI revealed that she suffers from bulging discs at C4-C5 and C5-C6, with resultant range of motion limitations, to wit: Dr. Dassa found the following limitations to Helene's cervical spine; (1) Flexion-- 60 degrees/40 degrees/33% loss; (2) Extension-- 75 degrees/30 degrees/60% loss; (3) Lat. Bending Right & Left- 45 degrees/35 degrees/23% loss; (4) Lat. Rotation Right & Left-- 80 degrees/30 degrees/63% loss.

In addition, Cole-Hatchard notes, Dr. Dassa's examination revealed that there is persistent dysfunction to Helene's left elbow and left shoulder, as evidenced by swelling and restricted ranges of motion as evidenced by "positive provocative orthopedic tests" (Exhibit 2, p. 3).

Further, he notes, Dr. Dassa found, to a reasonable degree of medical certainty, that these injuries and limitations were a direct result of this accident of January 2, 2015, and were permanent (Exhibit 2, p. 3).

Dr. Dassa also found the following limitations on the ranges of motion in Helene's left shoulder: (1) Flexion-- 170 degrees/160 degrees/6% loss; (2) Abduction-- 170 degrees/160 degrees/6% loss; (3) Internal rotation-- 60 degrees/50 degrees/17% loss; (4) External rotation- 90 degrees/80 degree/ 11% loss; (5) Extension-- 30 degrees/20 degrees/33% loss; and (6) Adduction-- 40 degrees/30 degrees/25% loss.

He also found that Helene suffered from reduced flexion range of motion in her left elbow of about 14%, with an actual measurement of 120 degrees as compared to normal range of motion of 140 degrees. (Exhibit 2, p. 3).

As to the motion at bar, Cole-Hatchard argues, the Defendant failed to meet her burden of demonstrating, *prima facie*, that neither Plaintiff suffered a "serious injury" within the meaning of

the no-fault law.

For example, he notes, the Plaintiffs allege that the severe injuries to Williams left knee and shoulder, with the concomitant range of motion limitations, constitute permanent consequential limitations of use of a body member, and/or significant limitations of use of a major body function and system.

In attempting to rebut this allegation, the Defendant proffered the affirmed report from Dr. Hendler. However, Cole-Hatchard argues, although Dr. Hendler opined that William's ranges of motion were normal, Dr. Hendler did not set forth the results of his tests as compared to normal values for the same. Rather, he merely made the conclusory statement that all ranges of motion were normal.

Moreover, Cole-Hatchard asserts, although Dr. Hendler acknowledged that William's MRI results showed tears of the medial meniscus and lateral meniscus in his left knee, Dr. Hendler did not address the significance of the same. Rather, he merely offered the conclusory and unsupported opinion that William suffered merely a bruised knee.

In sum, Cole-Hatchard argues, as to William, the Defendant failed to establish the lack of a permanent consequential limitation of use of a body organ or member by either quantitative evidence of existing versus normal range of motion, or a qualitative assessment comparing William's current condition to normal function.

Similarly, Cole-Hatchard asserts, all of the infirmities identified *supra* as to William also applied to Dr. Hendler's conclusions as to Helene. Indeed, Cole-Hatchard argues, Dr. Hendler's report is even more deficient as to Helene.

First, he notes, again, Dr. Hendler failed to state his actual measurements of Helen's

ranges of motion as compared with normal values for the same. Further, he notes, Dr. Hendler stated that he conducted range of motion testing on Helene's elbow by "visual measurement," not by use of an objective measuring device.

In addition, Cole-Hatchard asserts, although Dr. Hendler acknowledged that the MRI of Helene's spine showed bulging discs at two levels, he failed to address such injuries. Rather, he merely proffered his conclusory and unsupported opinion that Helene suffered a sprained neck.

In any event, Cole-Hatchard argues, even if the Defendant did demonstrate a *prima facie* case as to both Plaintiffs, the evidence *supra* in opposition submitted by the same is sufficient to raise triable issues of fact as to each.

Thus, he asserts, the Defendant's motion should be denied.

In reply, McCoy-Evans asserts that the only evidence submitted by the Plaintiffs was from Dr. Dassa, who examined the Plaintiffs only once, more than three (3) years after the accident.

McCoy-Evans argues that Dr. Dassa's report fails to provide a mechanism of injury for either Plaintiff.

Further, she notes, although Dr. Dassa stated that he had reviewed the office records of Dr. Yariv Maghen from Somers Orthopaedics, he did not attach the records to his report. Consequently, she asserts, she had attached the records to her reply papers.

According to the records, she notes, William appeared for examinations at Somers Orthopaedics on January 15, 2015, and March 31, 2015, which was at or around the time of the accident. At both examinations, she notes, he was found to have had a full range of motion in his left shoulder and left knee. This, she notes, is consistent with the findings of Dr. Hendler on

November 7, 2017.

Thus, she asserts, the first evidence of any restriction in William's range of motion is three after the accident, when he is examined by Dr. Dassa.

Additionally, she notes, although, on March 31, 2015, Dr. Maghen recommended that William undergo surgery on his left knee, William never underwent surgery.

McCoy-Evans notes that Helene was also seen at Somers Orthopaedics on January 15, 2015, and March 31, 2015. Further, that she too was found to have a full range of motion in left shoulder and elbow. The range of motion for her cervical spine at that time was not listed.

McCoy-Evans notes that, again, this was consistent with Dr. Hendler's findings on November 7, 2017.

Further, she notes, although, on March 31, 2015, Dr. Maghen recommended that Helene undergo a cortisone injection in her left elbow, Helene never underwent an injection.

Finally, McCoy-Evans notes, there is no evidence that either Plaintiff suffered from disfigurement.

Discussion/Legal Analysis

Under New York's No-Fault regulatory scheme, a party may commence an action to recover non-economic loss only in the event of a "serious injury," which is defined as:

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.

Insurance Law § 5102(d). The legislative intent underlying the No-Fault Law is to weed out frivolous claims and limit recovery to significant injuries. As such, the courts have required objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Subjective complaints of pain and limitations will not suffice unless supported by competent, admissible medical evidence, based on a recent examination and objective findings, that such subjective complaints of pain and limitation have a medical basis. *Perl v. Meher*, 18 N.Y.3d 208 (2011); *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 (2002); *Oliva v Gross*, 29 A.D.3d 551 [2nd Dept. 2006].

The two "limitation of use" categories of the statutory definition require some significant, permanent impairment. *Perl v. Meher*, 18 N.Y.3d 208 (2011). Whether a limitation of use or function is "significant" or "consequential" (*i.e.*, important) for purposes of the No-Fault Law 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. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Some injuries can be so minor, mild or slight as to be considered insignificant within the meaning of the No-Fault Law. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

To prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. *Perl v. Meher*, 18 N.Y.3d 208 (2011). The tests used must have an objective basis. They cannot be

simply a recording of the patients' subjective complaints. *Perl v. Meher*, 18 N.Y.3d 208 (2011).

A plaintiff need not necessarily demonstrate evidence of a restricted range of motion contemporaneous to the accident at issue. However, such evidence may be important to proving causation. *Perl v. Meher*, 18 N.Y.3d 208 (2011). Where causation is proved, the severity of the injuries may be measured at a later time. Indeed, injuries can become significantly more or less severe as time passes. *Perl v. Meher*, 18 N.Y.3d 208 (2011).

The burden as to causation is not met with evidence of a preexisting degenerative condition causing plaintiff's alleged injuries. *Perl v. Meher*, 18 N.Y.3d 208 (2011).

In general, the mere existence of a herniated or bulging disc 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. *Catalano v Kopmann*, 73 AD3d 963 [2nd Dept. 2010]; *Stevens v Sampson*, 72 AD3d 793 [2nd Dept. 2010].

A defendant moving for summary judgment must demonstrate, *prima facie*, that the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345; *Paul v. Weatherwax*, 146 A.D.3d 792 [2nd Dept. 2017].

Here, applying the above standards, the Defendant failed to demonstrate, *prima facie*, that neither Plaintiff suffered a serious injury within the meaning of the no-fault law from the accident at issue.

In any event, in opposition to the motion, the Plaintiffs' submission would have been found to have raised triable issues of fact as to each.

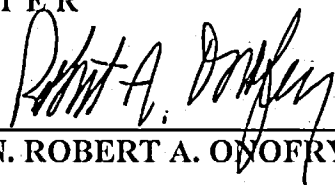
Thus, the Defendant's motion is denied.

Accordingly, and for the reasons cited herein, it is hereby,
ORDERED, that the motion is denied; and it is further,
ORDERED, that the parties are directed to appear for a conference on August 29, 2018,
at 9:15 a.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: July 10, 2018
Goshen, New York

ENTER



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