

<b>McGinnis v LeRouge</b>
2020 NY Slip Op 34952(U)
January 29, 2020
Supreme Court, Orange County
Docket Number: Index No. EF009406-2017
Judge: Catherine M. Bartlett
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

TAHISHA MCGINNIS,

Plaintiff,

-against-

MARY LeROUGE,

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. EF009406-2017
Motion Date: January 21, 2020

The following papers numbered 1 to 7 were read on Defendant's motion for summary judgment based upon the alleged absence of a serious injury per Insurance Law §5102(d):
Notice of Motion - Affirmation / Exhibits - Physician Affirmations (2) 1-4
Affirmation in Opposition - Physician Affirmation 5-6
Reply Affirmation 7

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for personal injuries allegedly sustained by plaintiff Tahisha McGinnis as the result of a motor vehicle accident that occurred on April 23, 2017 when a vehicle operated by defendant Mary LeRouge backed up and impacted the front of Plaintiff's vehicle. Plaintiff alleged that in consequence of the accident she sustained serious injuries to her right shoulder, left shoulder and lumbar spine.

Defendant moved for summary judgment, asserting that Plaintiff did not sustain a “serious injury” as defined by Insurance Law §5102(d) as a result of the April 23, 2017 accident. In response to Defendant’s motion, Plaintiff has abandoned all claims of “serious injury” except (1) as to her right shoulder and lumbar spine (2) under the Section 5102(d) threshold categories of “significant limitation of use of a body function or system” and “permanent consequential limitation of use of a body organ or member.”

**A. Lumbar Spine**

Plaintiff claimed that she sustained injury to her back in accidents before (2008) and after (June 2017) the April 23, 2017 accident at issue in this case. A May 15, 2017 MRI of the lumbar spine revealed no evidence of any post-traumatic findings. Treatment for Plaintiff’s back was limited to chiropractic and physical therapy. Physical examination of Plaintiff’s lumbar spine on April 22, 2019 (her orthopaedic IME) was normal. She had a full range of lumbar motion and no positive findings on objective testing. Defendant’s orthopaedic expert, Robert C. Hendler, M.D., opined that Plaintiff may have sustained a mild sprain of the lumbar spine at the time of the April 23, 2017 accident which had resolved; that she has no present disability of the lumbar spine; and that she will have no permanent findings relating thereto that would be causally related to the April 2017 accident.

In opposition, Plaintiff proffered no evidence of medical treatment for, or orthopaedic evaluation of, Plaintiff’s lumbar spine in the wake of the April 23, 2017 accident. Instead, she submits the affirmation of Charles W. Episalla, MD, who treated her only for shoulder injury, never for her back, and evaluated her lumbar spine just once, nearly two years after the accident, on February 14, 2019. “[A] contemporaneous doctor’s report is important to proof of causation;

an examination by a doctor years later cannot reliably connect the symptoms with the accident.” *Perl v. Maher*, 18 NY3d 208, 217-218 (2011). In the absence of objective medical proof of lumbar injury contemporaneous with the April 23, 2017 accident, Dr. Episalla’s findings two years afterward cannot be causally related to that accident without impermissible speculation. *See, id.*; *Griffiths v. Munoz*, 98 AD3d 997 (2d Dept. 2012); *Husbands v. Levine*, 79 AD3d 1098, 1099 (2d Dept. 2010).

Therefore, Defendant is entitled to summary judgment dismissing Plaintiff’s claim of “serious injury” with respect to her lumbar spine.

#### **B. Right Shoulder**

A May 19, 2017 MRI of Plaintiff’s right shoulder revealed *inter alia* “multifocal articular surface and intrasubstance fraying, perhaps shallow partial thickness tearing...” The report of Plaintiff’s initial orthopaedic evaluation on June 14, 2017 states that Plaintiff “was complaining of bilateral shoulder pain, right worse than left ever since her injury on 4/23/17.” Plaintiff “denie[d] any pain to the bilateral shoulders prior to her motor vehicle accident on 4/23/17.” Examination of the right shoulder showed *inter alia* a limited range of motion, tenderness along the proximal bicipital groove, and positive impingement signs with Neer and Hawkins maneuver. Plaintiff received a cortisone injection in her right shoulder only. The diagnostic impression was bilateral shoulder sprain/strain, bilateral shoulder traumatic impingement, and right shoulder partial rotator cuff tear. Plaintiff underwent arthroscopic surgery to her right shoulder on August 8, 2017. The operative findings included subacromial impingement and a partial thickness rotator cuff tear. Upon examination on February 14, 2019, her treating physician, Dr. Episalla, found “mild chronic residual symptoms to the right shoulder with limitations of range of motion

and pain affecting use of the extremity.” He noted that Plaintiff was working as a CNA but complained of difficulty with “cleaning and lifting, prolonged sitting, standing or walking.” He recommended that she not lift more than 20 pounds, and avoid excessive bending, squatting, pushing, pulling, climbing, crawling, or excessive lifting. Dr. Episalla opined that Plaintiff’s injuries had resulted in a permanent consequential limitation of use.

In the Court’s view, this evidence gives rise to a question of fact whether Plaintiff sustained injury to her right shoulder resulting in a “significant limitation of use of a body function or system” and/or a “permanent consequential limitation of use of a body organ or member.” The defense orthopaedist’s opinion to the contrary was demonstrably insufficient to establish the absence of a “serious injury” to the right shoulder causally related to the April 23, 2017 motor vehicle accident. In this regard, the Court observes:

- (1) Plaintiff had no prior history of shoulder problems.
- (2) Dr. Hendler states in conclusory fashion: “I do not *feel* there is any mechanism of injury at the time of the accident of record to cause her to have any significant problem in either of her shoulders.” However, if when Defendant backed into her vehicle Plaintiff was holding the steering wheel, the force of the impact would seemingly have been transmitted through her arms to her shoulders. Dr. Hendler does not address this potential mechanism of injury.
- (3) As set forth above, there is objective medical evidence of injury to the shoulder contemporaneous with the April 2017 motor vehicle accident.
- (4) Dr. Hendler states, again in conclusory fashion, that there no “post-traumatic findings” described in the right shoulder MRI or in Dr. Episalla’s operative report, but he fails to account for or even discuss the partial thickness rotator cuff tear.
- (5) On April 22, 2019, Defendant’s expert, Dr. Hendler, upon examination found limitations in range of motion of both shoulders. He attributed his findings to “significant symptom magnification”, i.e., malingering, but in light of the foregoing considerations this only gives rise to questions of fact.

It is therefore

ORDERED, that Defendant's motion for summary judgment is granted in part and denied in part, and it is further

ORDERED, that Plaintiff may at trial assert a claim of "serious injury" within the meaning of Insurance Law §5102(d) in that injury to her right shoulder resulted in a "significant limitation of use of a body function or system" and/or a "permanent consequential limitation of use of a body organ or member", and to that extent Defendant's motion for summary judgment is denied, and it is further

ORDERED, that in all other respects Plaintiff's claim of "serious injury" within the meaning of Insurance Law §5102(d) is stricken, and to that extent Defendant's motion is granted.

The foregoing constitutes the decision and order of the Court.

Dated: January 29 2020  
Goshen, New York

E N T E R

  
\_\_\_\_\_  
HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT  
JUDGE NY STATE COURT OF CLAIMS  
ACTING SUPREME COURT JUSTICE