

Thomson-Whorley v Shapiro
2020 NY Slip Op 35250(U)
March 9, 2020
Supreme Court, Orange County
Docket Number: Index No. EF00899/17
Judge: Robert A. Onofry
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

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

SUPREME COURT : ORANGE COUNTY

-----X

EVA C. THOMSON-WHORLEY and WILLIAM P.
WHORLEY,

Plaintiffs,

- against -

MEGAN N. SHAPIRO and MARITZA G. SHAPIRO,
Defendants.

-----X

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. EF00899/17

DECISION AND ORDER

Motion Date: January 22, 2020

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

Notice of Motion - Gomez Affirmation- Exhibits A-V	1-3
Affirmation in Opposition- Spilbor - Exhibit 1-9	4-5
Affirmation in Reply- Gomez	6

Upon the foregoing papers, it is hereby,

ORDERED that the motion is denied.

Factual/Procedural Background

The Plaintiff Eva C. Thomson-Whorley (hereinafter the "Plaintiff") was allegedly injured on February 4, 2014, when a vehicle she was driving was rear-ended by a vehicle owned by Maritza Shapiro and being driven by the Defendant Megan Shapiro.

The Plaintiff commenced this action to recover damages for personal injuries. The Plaintiff William Whorley, her husband, interposes derivative claims.

The Defendants move to dismiss the complaint on the ground that the Plaintiff did not sustain a "serious injury" within the meaning of the no-fault law.

In support of their motion, they submit an affirmation from their attorney, Vanessa Gomez.

Gomez notes that the Plaintiff claims the following injuries in her bill of particulars: (a) Right shoulder supraspinatus tendinopathy, subacromial bursitis, tenosynovitis of the long head of the biceps tendon; rotator cuff tendinosis without focal tear; small genohumeral joint effusion; impingement syndrome; (b) cervicalgia; sprain of cervical spine; © cervical region radiculopathy; (d) head trauma with headaches, dizziness, visual disturbance; (e) thoracic radiculopathy; (f) thoracic sprain/strain; (g) cervical sprain/strain; and (h) strain/sprain right hip.

However, she argues, the objective medical evidence establishes that such injuries do not fall within any of the nine categories of "serious injury" specified in Section 5102(d) of the No Fault Law.

As background, Gomez asserts that the Plaintiff's testimony at her examination before trial may be summarized as follows.

The Plaintiff testified that her vehicle was struck "extremely hard" from behind, and her head went backward, hitting on the headrest. Her right shoulder went forward and back, and hyper-extended.

After the accident, she felt pain to her head, neck, right shoulder and right hip; the upper part of the back, and below the neck by the shoulder blades, straight down to the upper part of her back.

When the ambulance arrived, she complained of head and neck pain.

She was taken by ambulance to the emergency room at St. Luke's hospital, where she complained of a severe headache, neck pain, and right shoulder and right hip pain. No X-rays were taken. The diagnosis was concussion, sprained neck and sprained upper back. She was given a prescription for medication, which she filled.

She was not released with a neck or back brace.

She never returned to St. Luke's for injuries from this accident.

About two weeks after the accident, she was seen by Dr. Hirsch for complaints of pain in her neck, right shoulder, right hip, and upper back, and of severe head pain. He prescribed medication. She saw him two or three times after that for follow-ups.

During the follow-up visits, Dr. Hirsch would prescribe pain killers and muscle relaxers.

Dr. Hirsch was did not perform any diagnostic tests.

About six to eight weeks after the accident, she saw Dr. Jaeger, a neurologist for complaints about loss of control over her right eyelid, and for black spots showing up in her vision.

She also went to Orange Regional Eye Physicians in Goshen, her ophthalmologist for ten years, with the same complaint.

She was treated by Dr. Nogrady, a chiropractor, starting a few weeks after the accident for complaints to her head, neck, right arm/shoulder and right hip. She started treatment at 3 times a week for 2 months, then 3 times a week for one month, then once a week until January 2015, and then on an as needed basis once every 2 months until 2016 when his practice was closed.

About one and a half to two years after the accident, she had been diagnosed by Dr. Nair with Lyme Disease.

She began physical therapy at Crystal Run Medical Center in for the first time late 2015 due to extreme pain in her extremities - her shoulder. She was unable to move her right and left arm at that point. She stopped physical therapy after 10 months when her no-fault case was closed.

She also saw Dr. Martin and was diagnosed with degenerative cervical disorder.

She had an EMG for her upper extremities for the prior accident in 2000, but did not recall having one after the 2014 accident.

Finally, she testified, her current complaints were constant headaches, pain in her neck, shoulder pain and right hip.

In further support of their motion, the Defendants submit an affirmed report from Adam Soyer, D.O. Dr. Soyer performed an independent medical examination of the Plaintiff on January 3, 2018 (Exhibit U).

As background, Dr. Soyer noted that the Plaintiff stated that she suffered injuries to the head, neck, mid-back, right shoulder, right hip and upper back from the accident, and that she was experiencing weakness in her hands, "nerve impingement", and "memory" issues.

There were no lacerations from the accident, but she reported a loss of consciousness for one minute.

She stated that she had improved "somewhat" with treatment.

Dr. Soyer noted that the Plaintiff's medical history included a diagnosis of Lyme disease, chiari malformation, and migraines. She also suffered an injury to her left knee in 2012.

She was then taking Naproxen and Cyclobenzaprine.

The Plaintiff stated that she was employed full-time as a teacher at the time of the

accident, and that she had missed about one week from work following the accident. She then went back to work.

At the time of Dr. Soyer's examination, the Plaintiff was complaining of pain in her neck, mid-back, right shoulder, right hip, upper back, and hands. Further, she complained of headaches and a "memory" issue. She rated her pain an 8 on a scale of 1 to 10 (with 10 being the worst).

She described the pain as dull and achy in nature, with radiations to her neck.

She also reported having difficulty climbing stairs, and stated that the pain was worsened by reaching overhead, bending, sleeping, and "looking up". She also reported "muscle spasms".

Upon examination, Dr. Soyer found the ranges of motion in the Plaintiff's cervical spine to be as follows: FLEXION-- 25° with 50° being normal; EXTENSION-- 0° with 60° being normal; RIGHT ROTATION-- 20° with 80° being normal; LEFT ROTATION-- 10° with 80° being normal; RT. LATERAL FLEXION-- 20° with 45° being normal; and LT. LATERAL FLEXION-- 10° with 45° being normal.

The ranges of motion in her right shoulder were as follows: ABDUCTION-- 100° with 180° being normal; ADDUCTION--10° with 30° being normal; FORWARD FLEXION-- 95° with 180° being normal; EXTENSION-- 40° with 40° being normal; INTERNAL ROTATION-- 65° with 80° being normal; and EXTERNAL ROTATION-- 45° with 90° being normal.

The ranges of motion in her left shoulder were as follows: ABDUCTION-- 150° with 180° being normal; ADDUCTION-- 20° with 30° being normal; FORWARD FLEXION--145° with 180° being normal; EXTENSION-- 40° with 40° being normal; INTERNAL ROTATION-- 80° with 80° being normal; and EXTERNAL ROTATION-- 60° with 90° being normal.

The ranges of motion in her right hip were as follows: FORWARD FLEXION-- 75° with 120° being normal; ABDUCTION-- 35° with 40° being normal; ADDUCTION-- 15° with 20° being normal; EXTERNAL ROTATION-- 20° with 50° being normal; and INTERNAL ROTATION-- 10° with 40° being normal.

The ranges of motion in her left hip were as follows: FORWARD FLEXION-- 110° with 120° being normal; ABDUCTION-- 40° with 40° being normal; ADDUCTION-- 20° with 20° being normal; EXTERNAL ROTATION-- 40° with 50° being normal; and INTERNAL ROTATION-- 20° with 40° being normal.

Dr. Soyer's diagnosis was as follows.

1. Cervical spine sprain, superimposed on pre-existing degenerative changes per MRI report.
2. Right shoulder sprain, resolved.

Dr. Soyer noted that his examination of the Plaintiff's right shoulder revealed a decrease in range of motion, although the findings could be considered subjective in nature. However, he noted, the records available to him did not describe a direct shoulder injury. Rather, the first record that describes right shoulder complaints was on September 2, 2015, which is approximately a year and a half after the accident of record. At that time, he noted, the Plaintiff was treated with an injection for what was described as an impression of osteoarthritis, which is an established degenerative condition and not related to an acute event.

Otherwise, he asserted, his examination did not reveal a basis for the Plaintiff's complaints of continuing pain in her back, right hip, upper back and hands.

Rather, based on his examination, he found no "objective evidence of residuals to the

cervical spine from a medical standpoint.”

The reported symptomology of the cervical spine was attributable to her pre-existing degenerative disc disease and degenerative joint disease, which predated the accident at issue.

Indeed, he asserted, at most, the accident temporarily aggravated the established pathology of the cervical spine. Therefore, he opined, any ongoing reported symptomology would not be related to the accident of record.

There were also no objective evidence of residuals to the right shoulder.

Finally, he noted, the Plaintiff had returned to work.

In further support of their motion, the Defendants submit an affirmed report of Alan Greenfield, M.D., D.A.B.R, an independent imaging consultant.

Based on his examination of cervical spine x-rays, Dr. Greenfield concluded as follows:

1. Straightening of cervical lordosis is a nonspecific finding which may be constitutional in origin, related to patient positioning, or due to restricted range of motion from multilevel degenerative bone spurs and/or degenerative facet arthropathy as detailed above. Muscular spasm cannot be excluded; however, this diagnosis cannot be made with any reasonable degree of medical certainty. The straightening cannot be attributed to the accident of 02/04/14 to a traceable degree of medical certainty.
2. There is no evidence of fracture.
3. There is multilevel degenerative bone spur formation from C4 through C7, along with multilevel degenerative facet arthropathy from C4 through T1. It is the combination of degenerative disc disease, as evidenced by diminished disc height, at C4-C5, along with degenerative facet arthropathy at this level that results in minimal posterior subluxation/retrolisthesis, of C4 over C5. There is no spondylolysis or fracture. This is completely and entirely unrelated to the accident of 02/04/14.
4. The constellation of the above noted findings cannot be attributed to an accident occurring on 02/04/14 to any reasonable degree of medical certainty. The findings outlined above indicate chronic and longstanding multilevel degenerative facet arthropathy, with degenerative disc disease and multilevel degenerative bone spur formation throughout the mid and lower cervical spine as indicated above.

Based on his examination of an MRI of the Plaintiff's right shoulder, Dr. Greenfield concluded:

1. There is chronic tendinosis of the supraspinatus tendon with mild degenerative fraying along the bursal surface and associated with mild adjacent fluid in the subacromion/subdeltoid bursa. These findings in their entirety are easily explainable on the basis of degenerative arthrosis beneath the anterior undersurface of the AC joint, which are likely to contribute to chronic longstanding mechanical irritation and degradation as well as inflammation of the bursa and adjacent supraspinatus tendon itself. The constellation of these findings in the aggregate cannot be attributed to an accident occurring on 02/04/14 to any reasonable degree of medical certainty.
2. Similarly, degenerative subcortical cyst and the minimal intra-articular fluid also cannot be attributed to the accident of 02/04/14, with the small degenerative subcortical cyst likely developing over a period of several years.
3. In summary, there are no findings on this study which can be attributed to the accident of 02/04/14 to any reasonable degree of medical certainty, while the constellation of the above noted findings are all consistent with chronic longstanding degenerative arthropathy as discussed in detail above.

In opposition to the motion, the Plaintiff submits an affirmation from counsel, Andrew Humphreys.

Initially, Humphrey notes, the records offered by the Defendants as Exhibits "F" through "T" are not certified pursuant to CPLR 4518(c).

Further, he asserts, the affirmations of Dr. Soyer and Dr. Greenfield are based on records and films not in evidentiary form and, therefore, must be disregarded.

In any event, Humphrey argues, the Defendants motion must be denied because their experts agree, at a minimum, that the accident at issue aggravated and/or exacerbated pre-existing injuries, resulting in increased suffering and pain.

In addition, he asserts, although some of the findings and conclusions of Dr. Soyer are disputed, his affirmation establishes that objective testing was performed with positive findings.

For example, he notes, Dr. Soyer found significant decreases in the ranges of motion in the Plaintiff's cervical spine and right shoulder. And, he asserts, although Dr. Soyer attempts to minimize these objective finding by referring to pre-existing degenerative disc disease and degenerative joint disease, Dr.Soyer concedes that, "the accident temporarily aggravated the established the pathology of the cervical spine." Humphreys argues that this statement is a "concession" because Dr. Soyer does not clarify or provide any evidentiary support for what is meant by "temporary."

In further opposition to the motion, the Plaintiffs submit an affirmed report from Paul G. Jones, M.D., who performed an independent orthopaedic medical examination of the Plaintiff on April 12, 2016, based on her complaints of "right-sided cervical problems."

Jones found various (stated) limitations in the Plaintiff's ranges of motion in her cervical spine and in her right shoulder.

Jones concluded: "After review of the available information, taking a history and performing a physical examination, it is apparent the injury sustained and the accident reported, are causally related."

In reply, counsel for the Defendants, Vanessa Gomez, argues that the Defendants demonstrated, *prima facie*, through various medical records and expert opinions, that the Plaintiff did not suffer a "serious injury" within the meaning of the no-fault law. Rather, that all of her complaints either arose from prior injuries or from degenerative conditions.

In opposition, she notes, the expert reports from the Plaintiff's doctors are all several years old, and there is no explanation for the significant gap.

Further, she argues, although the Plaintiff attached MRI reports from 2015 and 2016

taken of her right shoulder (10/28/15) and cervical spine (11/4/15 and 4/14/16), she presented no expert medical indicating that any of the findings are causally related to the accident as issue.

In fact, she asserts, all of the MRI findings indicate degeneration, which is consistent with Dr. Greenfield's findings.

In sum, she argues, the Plaintiff presented no evidence in admissible form from any doctor that she had sustained a "serious injuries" from the accident at issue.

Thus, she asserts, the Defendants' motion should be granted.

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 AD3d 551 [2nd Dept. 2006].

Objective and competent evidence of significant range-of-motion limitations in a plaintiff's neck and/or spine are sufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law § 5102(d). *Mangione v. Bua*, 148 A.D.3d 799 [2nd Dept. 2017]; *Bachan v. Maggies Paratransit*, 71 A.D.3d 610 [2nd Dept. 2010].

Further, a "significant limitation" need not be permanent in order to constitute a serious injury. *Estrella v. Geico Ins. Co.*, 102 A.D.3d 730 [2nd Dept. 2013]. Any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation. *Estrella v. Geico Ins. Co.*, 102 A.D.3d 730 [2nd Dept. 2013]. 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 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, this burden was not met.

The Defendants' expert, Dr. Soyer, found significant limitations in the range of motion in the Plaintiff's cervical spine and right shoulder, and mild to moderate limitations as to her left shoulder and right and left hip.

The Court does not find any competent, evidentiary basis in the submission of either Dr. Soyer or Dr. Greenfield, that these limitations can all be traced either to degenerative changes or pre-existing injuries, or are not causally related to the accident.

Further, given that Dr. Soyer's examination of the Plaintiff was almost four years after the accident at issue, at which time the Plaintiff still had complaints of significant pain, and some significant limitations in her ranges of motion, it is unclear what is meant when he states that issues with her right shoulder had "resolved" and the accident had only "temporarily" aggravated the established pathology of the cervical spine.

Thus, the Defendants' motion is denied without need to examine the Plaintiffs' opposing papers.

Accordingly, and for the reasons cited herein, it is hereby,

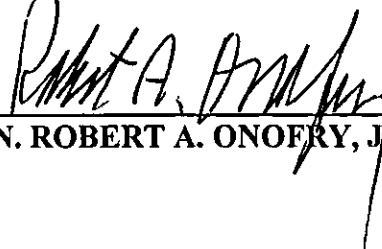
ORDERED, that the Defendants' motion for summary judgment and dismissal of the claims is denied; and it is further,

ORDERED that the parties, through respective counsel, are directed to, and shall, appear for a Status/Pre-Trial Conference on Tuesday April 21, 2020, at 1:30 p.m., at the Orange County Court House, 285 Main Street, Court room #3, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: March 9, 2020
Goshen, New York

ENTER



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