

**Drayton v Drayton**

2023 NY Slip Op 30440(U)

January 27, 2023

Supreme Court, New York County

Docket Number: Index No. 160090/2019

Judge: James G. Clynnes

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This opinion is uncorrected and not selected for official publication.



In support of their motion, Defendants rely on the affirmed report of Dr. Howard A. Kiernan Jr., orthopedic surgeon. Dr. Kiernan reviewed relevant medical records and reported that Plaintiff's cervical, thoracic, and lumbar spine sprains/strains are resolved, as are Plaintiff's bilateral shoulder sprain/strain and bilateral knee sprain/strain. Dr. Kiernan measured Plaintiff's range of motion with a goniometer pursuant to AMA guidelines and found normal range of motion as to the cervical, thoracic, and lumbar spine, right and left shoulders, and right and left knees, as well as negative objective tests as to the cervical and lumbar spine, right and left shoulders and right and left knees. Dr. Kiernan concluded that there is no evidence of orthopedic disability. As Dr. Kiernan only diagnosed Plaintiff with sprains and strains, which are insufficient for the serious injury threshold under Insurance Law 5102 (d), Defendants have shown that Plaintiff did not sustain a serious injury (*Gaddy v Eyer*, 79 NY2d 955 [1992]; *Nagbe v Minigreen Hacking Group*, 22 AD3d 326 [1st Dept 2005]).

In opposition, Plaintiff relies on Plaintiff's treatment records from Park Place Chiropractic and Rehabilitation Center, unaffirmed MRI report of lumbosacral spine by Dr. Michael Green, radiologist, unaffirmed MRI report of cervical spine and left knee by Priyesh Patel (done in 2017 and 2018), affirmed report of Dr. Ralph Wheeler of Oasis Medical & Surgical Wellness Group, affirmed report of Dr. Keith Johnson of Oasis Medical & Surgical Wellness Group.

Despite being unsworn and ordinarily inadmissible, contemporaneous medical reports, including MRIs, may be used to in a summary judgment motion if reviewed and cited by opposing experts (*Gorden v Tibulcio*, 50 AD3d 460 [1st Dept 2008]). However, if the medical records are simply viewed by Defendants' expert and not relied upon by him, as in this case, the exception does not apply (*Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]). Here, Dr. Kiernan listed the submitted medical records available for his review, which included, in relevant part, Plaintiff's

Bill of Particulars, MRI reports of the lumbar spine, cervical spine, and left knee, reports from Park Place Chiropractic and Rehabilitation Center, reports from Oasis Medical and Surgical Wellness Group, among others. Dr. Kiernan did not mention these records or reports in his findings. As such, Plaintiff improperly relied on the unaffirmed medical records labeled "Park Place Medical Records."<sup>1</sup> Plaintiff's unsworn MRI reports are also inadmissible because Defendants' experts also did not submit these unsworn reports with their own or expressly rely on them in reaching their own conclusions (*Clemmer v Drah Cab Corp.*, 74 AD3d 660 [1st Dept 2010]).

Dr. Wheeler performed undisclosed range of motion tests and found that Plaintiff had  $\frac{1}{2}$  normal flexion at the neck and  $\frac{3}{4}$  normal extension at the neck, as well as  $\frac{1}{2}$  normal flexion at the waist and  $\frac{1}{2}$  normal extension at the waist. He concluded, without detailing an objective basis for his assessment, that these conditions were caused by the subject accident, and that they may require surgery in the future, rendering the injuries permanent. Although Dr. Wheeler reported a limitation of Plaintiff's range of motion, his report failed to explicate these results by disclosing the objective tests used and how the assessment was made (i.e., using a goniometer) (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]). In order to raise a triable issue of fact, Plaintiff must demonstrate a limitation of range of motion sustained by objective medical findings that are based on a recent examination (*Thompson v Abbasi*, 15 AD3d 95, 97 [1st Dept 2005]). Plaintiff has failed to do so. Therefore, Dr. Wheeler's report is deficient because it does not properly compare his findings to the standards for normal ranges of motion (*Soho v Konate*, 85 AD3d 522 [1st Dept 2011]).

Dr. Johnson examined Plaintiff's left knee and found no obvious effusion, and although she had some discomfort, there was no ligamentous knee instability. Upon review of Plaintiff's

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<sup>1</sup> The majority of the content therein is illegible with only one identifying factor to confirm they are in fact from Park Place Chiropractic & Physical Rehabilitation Center on page 32 of 40.

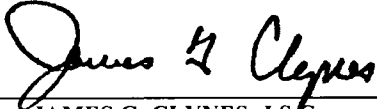
left knee MRI report and films, Dr. Johnson noted degeneration of the lateral meniscus with no tear, although it would likely respond to surgical treatment.

Plaintiff's submission is insufficient to establish a material issue of fact regarding a serious injury under Insurance Law 5102 (d). Further, Plaintiff's examination before trial testimony that she was confined to her home following the accident for about one week and missed about ten days from work, taken periodically, as well as the fact that her Bill of Particulars list that she was not confined to her bed or her house, undermine her chance of establishing a 90/180-day claim (*Nguyen v Abdel-Hamed*, 61 AD3d 429, 430 [1st Dept 2009]; *Lopez v Abdul-Wahab*, 67 AD3d 598, 599-600 [1st Dept 2009]). Accordingly, as the plaintiff has failed to submit admissible evidence sufficient to raise a triable issue of fact, it is

**ORDERED** that the motion by Defendants Robert M. Turner and Michelle Turner for summary judgment and dismissal of the complaint against them is granted and the Clerk is directed to enter judgment accordingly in favor of the movant defendants; and it is further

**ORDERED** that within 30 days of entry, Movants shall serve a copy of this Decision and Order upon Plaintiff with Notice of Entry.

This constitutes the Decision and Order of the Court.

<u>1/27/2023</u> DATE	 _____ JAMES G. CLYNES, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE