Sasko v Mulvenna-Goldstein
2024 NY Slip Op 35052(U)
December 17, 2024
Supreme Court, Westchester County
Docket Number: Index No. 56281/2020
Judge: William J. Giacomo
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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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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PATRICIA SASKO, AS MOTHER AND NATURAL GUARDIAN OF A.A., AN INFANT, AND PATRICIA SASKO, INDIVIDUALLY,

Plaintiffs,

– against –

EILEEN MULVENNA-GOLDSTEIN,

Defendant.

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Index No. 56281/2020

Motion Seq. Nos. 003 & 004

DECISION & ORDER

In an action to recover damages for personal injuries, in motion sequence 003, defendant Eileen Mulvenna-Goldstein moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the infant plaintiff's complaint on the grounds that the alleged injuries sustained by the infant plaintiff do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the New York State Insurance Law. In motion sequence 004, plaintiff on the counterclaim, Patricia Sasko, cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the infant plaintiff's complaint on the same grounds. Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

Papers Considered **NYSCEF DOC NO. 53-83**

1. Notice of Motion/Affirmation of Patrick Neglia, Esq./Exhibits A-I
2. Notice of Cross Motion/Affirmation of Cristina M. Moreira, Esq. in Support
3. Affirmation in Opposition of Antonio Marano, Esq./Memorandum of Law in Opposition/Exhibits A-F
4. Affirmation in Opposition of Antonio Marano, Esq.
5. Reply Affirmation of Patrick Neglia, Esq.
6. Reply Affirmation of Cristina M. Moreira, Esq.

FACTUAL AND RELEVANT PROCEDURAL BACKGROUND

Plaintiff commenced this action on or about June 17, 2020 by filing a summons and complaint for personal injuries sustained as a result of a motor vehicle accident that occurred on

November 20, 2018 at the intersection of Wall Street and Lakeview Avenue in Mount Pleasant, New York. At the time of the accident, plaintiff was driving and the infant plaintiff, who was nine years old at the time, was a passenger. Issue was joined on July 27, 2020.

Plaintiff's bill of particulars alleges that the defendant was negligent in that she failed and/or refused to yield to the right of way and failed and/or refused to stop at the stop sign located on Wall Street at the above-mentioned intersection. As a result, both she and the infant plaintiff sustained serious injuries. As relevant here, the bill of particulars alleges that the infant plaintiff sustained, among other things, cervical pain, headaches, mid-lower back pain, and left shoulder internal derangement. Further, the infant plaintiff also missed intermittent days of school. Defendant asserted a counterclaim against plaintiff stating that, if the infant plaintiff sustained injuries and damages at the time and place set forth in the Complaint through any carelessness and negligence other than her own, then said injuries and damages were sustained in whole or in part by the reason of the carelessness, negligence and culpable conduct of the plaintiff, and therefore plaintiff will be liable to this defendant for the amount of any recovery, if any by the infant plaintiff.

Defendant moves for summary judgment dismissing the complaint on the basis that the injuries claimed by the infant plaintiff do not satisfy the serious injury threshold requirement of Insurance Law § 5102 (d). Defendant notes that the infant plaintiff did not go to the hospital after the accident, and only sought treatment at an urgent care several days after. She subsequently received physical therapy but stopped treatment in approximately August 2022.

In support, defendant submits a report from Scott V. Haig, M.D., an orthopedist, who performed an independent medical examination (IME) of the infant plaintiff on November 10, 2023, and reviewed plaintiff's medical records, including cervical and lumbar MRIs and the physical therapy notes. Dr. Haig states that the infant plaintiff is a "14-year-old high school freshman who is a starter on the Varsity Field Hockey team in her school. She also plays Varsity Lacrosse." He states that the infant plaintiff complains of occasional pain at the base of her neck and in the low back area. The infant plaintiff denied neurologic symptoms and has completed her course of physical therapy. He opines that the "MRI findings of her lumbar spine are essentially normal and those of her cervical spine are essentially normal as well." The range of motion measurements were as follows:

> "Range of motion of the neck is checked actively while standing. She has 90 degrees of extension, 80 degrees of flexion, and 80 degrees of rotation in both directions. This is checked actively using a goniometer. Normal neck range of motion for a girl of this age is

> flexion 80 degrees, extension 80 degrees, 80 degrees of rotation in both directions. The lumbar spine shows no spasm, no tenderness. She has active extension to 35 degrees and flexion to 100 degrees, normal extension for a girl this age is 25 degrees and normal flexion is 90 degrees."

Dr. Haig summarizes that the infant plaintiff "is a very athletic and highly functional 14-year-old girl who has recovered entirely from the accident as described. In my opinion, she does not require further treatment and will continue in high level athletics."

In sum, given the evidence and Dr. Haig's report, defendant argues that the infant plaintiff sustained, at most, minor whiplash type injuries, which have all resolved and are not recoverable as serious injuries. Further, during the infant plaintiff's testimony, she testified that she does well in school, participates in school sports and did not recall missing any gym classes as a result of the accident. Thus, there is allegedly no objective evidence to demonstrate that she was prevented from performing her usual and customary activities for 90 out of the 180 days following the accident.

Plaintiff on the counterclaim cross-moves for summary judgment for the same reasons as set forth in defendant's motion, and incorporated defendant's facts and arguments in her cross motion. She argues that the evidence set forth in defendant's motion establishes, prima facie, that the infant plaintiff did not sustain a serious injury, and seeks summary judgment on the infant plaintiff's complaint for non-economic loss.

In opposition, the infant plaintiff argues that defendants failed to meet the initial burden on the issue of serious injury. Among other arguments, the infant plaintiff claims that Dr. Haig admittedly examined the infant plaintiff approximately five-years post-accident, so he cannot opine on the medical condition of the infant plaintiff within the 180 days immediately following the accident. Further, although the bill of particulars had alleged injuries that were partially neurological in nature, defendant did not submit a neurological IME.

The infant plaintiff also argues that she has raised triable issues of fact as to whether the infant plaintiff sustained a serious injury. To support her claim, the infant plaintiff submits the medical report of Gerald Gaughan, M.D., from Doctors United, who examined the infant plaintiff on June 18, 2024. Upon examination, Dr. Gaughan documented as follows:

> "There is tenderness and spasm across the cervical and lumbosacral paraspinal muscles. There is tenderness and spasm extending over the trapezius muscle distributions, left worse than right. The goniometric range of motion of the neck: flexion is 45 degrees, extension is 50 degrees, rotation to the left is 70 degrees, rotation to the right is 70 degrees, lateral

> bending to the left is 40 degrees and lateral bending to the right is 45 degrees (normal flexion is 50 degrees, normal extension is 60 degrees. normal rotation bilaterally is 90 degrees and normal lateral bending bilaterally is 40 degrees). The goniometric range of motion of the trunk: flexion is 80 degrees, extension is 25 degrees, rotation to the left is 45 degrees, rotation to the right is 45 degrees. lateral bending to the left is 30 degrees and lateral bending to the right is 30 degrees (normal flexion is 100 degrees, normal extension is 30 degrees. normal lateral bending is 40 degrees and normal rotation is 45 degrees)."

Dr. Gaughan also opined that the infant plaintiff's injuries are causally connected to the motor vehicle accident that occurred on November 20, 2018. Further, the infant plaintiff is still symptomatic from conditions involving the neck and back due to the injuries sustained on that date. She has ongoing limitation in back and shoulder mobility from these injuries which result in permanent partial loss of use of the neck and back. And, "permanent limitations in the mobility of the neck and back as result of the above are expected to persist."

Dr. Gaughan states that he was aware of Dr. Haig's report. Dr. Gaughan opined that the infant plaintiff "had to give up playing field hockey because the back was being aggravated. She also gave up competitive swimming because the neck and back were constantly being aggravated. This is not accurately documented in his report. He also failed to note range of motion defects at the neck and back which the patient continues to have."

The infant plaintiff also submits an affidavit in opposition to the summary judgment motions. She affirms that, at the time of the accident, she was nine years old and had been seated behind the driver's seat and wearing her seatbelt. She was returning home from swim practice that evening. After the accident, she was treated at urgent care and then referred to physical therapy, where she received therapy for her neck, back and shoulders. She affirms that initially she had daily physical therapy sessions. At the time of the accident, she was an active swimmer and had to miss time due to recovery and eventually stopped swimming. She missed gym classes for doctor and therapy sessions. She affirms that she is still limited in performing activities such as back bends, picking up objects and she still suffers significant pain due to the accident on her cervical and lumbar spine, and has difficulty sleeping, The pain and stiffness in her cervical and lumbar spines have not fully resolved. Her current limitations are "pain sitting in class and during physical activities. I still to this day have difficulties in sports like field hockey, lacrosse, and swimming." She affirms that these pains and limitations were not present prior to the accident and occurred as a direct result of the accident.

The infant plaintiff also argues that the MRI results themselves demonstrates a question of fact with respect to the seriousness of the infant plaintiff's injuries. For example, the infant plaintiff had an MRI of the lower lumbar spine on in June 2022 and the results indicated L4-5, L5-Sl posterior disc bulges indent the thecal sac. According to the infant plaintiff, the MRI results, contemporaneous range of motion limitations and continued complaints of pain are sufficient to satisfy the standard for serious injury.

Further, by her affidavit and testimony, the infant plaintiff has allegedly demonstrated that she was partially incapacitated from her normal and customary activities for 90 of the first 180 days following the accident. The infant plaintiff also experiences pain and discomfort as a result of the accident, including the inability to sleep at night.

In reply, among other things, defendant argues that the infant plaintiff's opposition is insufficient as it relied on a self-serving affidavit from the infant plaintiff and a report prepared solely to defeat summary judgment. Further, the arguments in opposition do not change the allegedly uncontroverted findings of Dr. Haig.

Plaintiff on the counterclaim also states in reply that Dr. Haig's report is sufficient to establish that the infant plaintiff did not sustain a serious injury. Among other things, plaintiff on the counterclaim also argues that the infant plaintiff had full range of motion in her shoulder one month after the accident. She points to a record from an urgent care visit dated December 29, 2018. The infant plaintiff presented for complaints of left shoulder pain and upon examination, the provider states that the infant plaintiff has "full rom" in her shoulder. Plaintiff on the counterclaim continues that Dr. Gaughan failed to reconcile this medical record with his own findings six years later.

DISCUSSION

I. Serious Injury

> "To recover damages for noneconomic loss related to personal injury allegedly sustained in a motor vehicle accident, the plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102 (d), but also that the injury was causally related to the accident."

Valentin v Pomilla, 59 AD3d 184, 186 (1st Dept 2009) (internal quotation marks and citation omitted).

On a motion for summary judgment in a personal injury action arising from a motor vehicle accident, the defendant is required to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a result of the accident. *See Owens v ELRAC, LLC*, 213 AD3d 684, 685 (2d Dept 2023).

In pertinent part, a "serious injury" has been defined as permanent loss of use of a body organ, a significant limitation of use of a body function, or an "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).

Here, defendant submitted competent medical evidence, through the affirmed IME report of Dr. Haig, establishing, prima facie, that the infant plaintiff's alleged soft tissue injuries to her neck, back and shoulders do not meet the threshold of serious injury within the permanent loss of use of a body organ or significant limitation of use of a body function categories. Dr. Haig examined the infant plaintiff five years after the accident, reported his range of motion checks, reviewed the MRI reports and opined that the infant plaintiff has recovered entirely. *See e.g. Willis v New York City Transit Auth.*, 14 AD3d 696, 697 (2d Dept 2005) (The defendants' examining physician examined Singleton approximately 1 1/2 years after the accident. He reported his findings with respect to the various ranges of motion of Singleton's cervical and lumbar spines and shoulders, and found no tenderness or muscle spasm. Additionally, the neurological examination was normal, and other tests performed showed no abnormalities. The examining physician opined that Singleton had no disability").

In opposition, however, the infant plaintiff raised triable issues of fact as to whether she sustained a serious injury by submitting the affirmation of plaintiff's treating doctor, Dr. Gaughan. Dr. Gaughan specifically rejected Dr. Haig's contentions and provided his own range of motion measurements, alleging that Dr. Haig failed to include certain measurements. Dr. Gaughan opined that plaintiff was still symptomatic from neck and back conditions as a result of the accident and that she has ongoing limitations to back and shoulder mobility. *See e.g. Pesce v Tillotson*, 7 AD3d 597, 598 (2d Dept 2004) (internal citation omitted) ("The orthopedist, after reviewing, inter alia, the MRI report and conducting a physical examination of the plaintiff that included objective range of motion testing, opined that the plaintiff sustained trauma-induced

C5/6 central disc herniation, radiculopathy, and quantified limitations of her range of motion. This evidence was sufficient to raise a triable issue of fact").

Thus, "[t]he conflicting medical reports of the parties' respective experts raised triable issues of fact as to whether the plaintiffs sustained serious injuries within the meaning of Insurance Law § 5102 (d)"). *Garcia v Long Is. MTA*, 2 AD3d 675,675 (2d Dept 2003).

Moreover, defendant's expert's range of motion measurements for both the neck and lumbar spine indicated a ten degree restriction. Courts have denied motions for summary judgment where the range of motion was only restricted ten degrees. *See e.g. Schwartz v New York City Hous. Auth.*, 229 AD2d 481, 481 (2d Dept 1996) ("In opposition to the defendants' motion for summary judgment, the plaintiff met her burden by demonstrating that she suffered a serious injury within the meaning of Insurance Law § 5102 (d). Specifically, the plaintiff submitted an affidavit from a doctor of osteopathy who stated that plaintiff incurred 'restricted motion [of the lumbar spine] by 10 degrees … after achieving maximum medical improvement'. This affidavit concluded that the plaintiff is 'permanently partially disabled'").

While the plaintiff on the counterclaim argues that an examination performed at the urgent care indicated that the infant plaintiff had "full rom" in her shoulder, this does change the Court's determination. First, plaintiff on the counterclaim did not proffer any of her own arguments but relied on defendant's submissions. She only presents her own arguments in reply. Next, this examination, performed at an urgent care by an unknown provider, did not report any quantified measurements, nor did it document whether any objective testing was used to determine the range of motion. Defendant's expert also did not address this urgent care record in his expert report. As a result, it is of no value in assessing whether the infant plaintiff sustained a serious injury. The Court of Appeals has held that "an expert' s opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims." *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 351 (2002).

The Court finds that triable issues of fact also remain as to whether the infant plaintiff's injuries meet the threshold of serious injury within the 90/180 category. The infant plaintiff testified that she had physical therapy sessions almost daily after the accident, with sessions continuing at least six months, and that the pain and other issues from her injuries caused her to be unable to attend to her usual and customary activities for a period not less than 90 days during

the 180 days immediately following the accident. Dr. Haig's expert report was insufficient, as he performed his exam five years after the accident and only addressed plaintiff's condition at the time of the examination, and not six months immediately following the accident. *See Toussaint v Claudio*, 23 AD3d 268, 268 (1st Dept 2005) ("The reports of the defense medical experts, based on examinations of plaintiff conducted six years after the subject automobile accident, addressed plaintiff's condition as of the time of the examination, not during the six months immediately after the accident, and were, accordingly, insufficient to sustain defendant summary judgment movant's burden of proof to establish prima facie that plaintiff had not sustained serious injury by reason of having been incapacitated from performing substantially all of his customary and daily activities for 90 of the 180 days following the accident").

Accordingly, for the reasons set forth above, defendant and plaintiff on the counterclaim's separate motions for summary judgment are denied. All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court notwithstanding the specific absence of reference thereto.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant Eileen Mulvenna-Goldstein's motion for an order granting summary judgment dismissing the infant plaintiff's complaint is denied (motion sequence 003); and it is further

ORDERED that plaintiff on the counterclaim Patricia Sasko's cross motion for an order granting summary judgment dismissing the infant plaintiff's complaint is denied (motion sequence 004).

The parties are directed to appear for a virtual settlement conference on March 3, 2025 at 10:30 a.m. subject to confirmation by the virtual conference link emailed by this Court.

Dated: White Plains, New York
December 17, 2024

HON. WILLIAM J. GIACOMO, J.S.C.