

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

Hon. Marvin E. Segal,
Justice.

KELLY BURCH and WARD PICKOW,

Plaintiffs,

- against -

**STEPHANIE BARDEKOFF, ROBERT S.
BARDEKOFF and LINDA BARDEKOFF,**

Defendants.

Trial/IAS Part 4
Index No. 13952/01
Motion No. 001
Motion Date 12/04/03

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The motion brought by the Defendants, in the above captioned action, for an order of this Court, pursuant to Rule 3212 of the CPLR and Insurance Law Section 5102, granting summary judgment in favor of the Movants dismissing the Plaintiffs' Complaint for their failure to sustain a statutorily defined "serious injury" is denied.

The instant action arises out of a motor vehicle accident that occurred on September 4, 2000 wherein the motor vehicle operated by the Plaintiff, Ward Pickow, in which the Plaintiff, Kelly Burch, was a passenger, was struck in rear by a motor vehicle owned and operated by the Defendants. Immediately thereafter the Plaintiffs were treated and released, on the date of the accident, at North Shore University Hospital.

The rule in motions for summary judgment has been stated by the Appellate Division, Second Dept., in Stewart Title Insurance Company v. Equitable Land Services, Inc.,

“It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 853, Zuckerman v. City of New York, 49 NY2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State Bank v. McAuliffe, 97 AD2d 607), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v. Prospect Hosp., 68 NY2d 320, 324; Zuckerman v. City of New York, supra, at 562).”

New York Insurance Law Section 5102(d) defines “serious injury” as follows:

“Serious injury” means a personal injury which results in 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.

In support of the instant motion the Defendants have submitted the following:

- North Shore University Hospital Records of Ward Pickow;
- Zwanger - Pesiri Radiology Group MRI report of Ward Pickow;
- Transcript of oral deposition before trial of the Plaintiff, Ward Pickow;
- Affirmed report of Barry M. Katzman, M.D., regarding his December 19, 2002 orthopedic examination of Ward Pickow;
- North Shore University Hospital records of Kelly Burch;
- Rockville Centre Physical Rehabilitation Associates MRI report of Kelly Burch;
- September 12, 2000 and November 1, 2000 no-fault applications of Kelly Burch;

- Earnings report of Kelly Burch;
- Affirmed report of Barry M. Katzman, M.D., regarding his December 19, 2002 orthopedic examination of Kelly Burch;
- Transcript of oral deposition before trial of the Plaintiff Kelly Burch; and
- Affirmed report of Paul S. Needelman, M.D., regarding his review of "... the submitted MRI's (sic) performed at Metropolitan Diagnostic Imaging, P.C. and Zwanger-Pesiri Radiology Group, LLP on Kelly Burch and her husband Ward Pickow"

Initially, it should be noted that there is nothing before this Court with respect to any MRI of either Plaintiff performed at Metropolitan Diagnostic Imaging.

In his affirmation, Dr. Katzman reports of his December 19, 2002 orthopedic examination of Ward Pickow:

"ORTHOPEDIC PHYSICAL EXAMINATION:

CERVICAL SPINE:

Examination of the cervical spine reveals full range of motion with no spasm or tenderness noted. He had lateral rotation and bend to 45 degrees. He could shrug his shoulders symmetrically. He had a negative Sperling's test. There was no tenderness to palpation. There were no palpable masses in the neck and he had good strength.

The patient was able to get on and off the examining table without any difficulty and could go down to a squat.

UPPER EXTREMITIES:

Examination of the upper extremities including the shoulder, elbow, wrist and digits revealed full range of motion. There was no tenderness over the A/C joint, biceps or rotator cuff. There was a negative apprehension sign. There were no impingement signs and no laxity. No palpable masses were noted.

THORACOLUMBAR SPINE:

Examination of the thoracolumbar spine revealed forward flexion to 90 degrees, extension 20 degrees and rotation to 45 degrees in all planes. There were no swellings, deformities or abnormalities noted. Straight leg was negative. Reflexes were 2+ throughout, sensory is intact and strength is 5/5.

IMPRESSION:

Resolved cervical and lumbar strain with subjective complaints without any objective findings.

FURTHER TREATMENT:

The patient requires no further orthopedic treatment.

DISABILITY:

The patient has no disability. He can work and perform all the activities of daily living without restrictions.”

In his affirmation, Dr. Katzman reports of his December 19, 2002 orthopedic examination of Kelly Burch:

“ORTHOPEDIC PHYSICAL EXAMINATION:

CERVICAL SPINE:

Examination of the cervical spine reveals full range of motion in all planes with no spasm or tenderness noted. She had lateral rotation and bend to 45 degrees. She could shrug her shoulders symmetrically. She has a negative Spurling’s test.

There was no tenderness to palpation of the cervical spine. There were no palpable masses in the neck and there was good strength.

UPPER EXTREMITIES:

Examination of the shoulders, elbows, wrists and digits revealed full range of motion with no limitations or pain to resistance. There were no swellings or abnormalities noted. Relative to her complaints of numbness, she has normal sensation of light touch in both hands. She has a negative Tinel at the carpal tunnel and cubital tunnel.

THORACOLUMBAR SPINE:

Examination of the thoracolumbar spine revealed 0-70 degrees range of motion. There was no spasm noted. She could stand on either leg independently. There was no tenderness to palpation.

LOWER EXTREMITIES:

She has no tenderness to palpation of her calf.

She has full range of motion of her knees and ankles.

IMPRESSION:

Resolved cervical and lumbar strain with subjective complaints of buttock pain.

IMPRESSION:

Cervical strain, resolved.

Lumbar strain, resolved.

Ulnar nerve neuropraxia.

CAUSALITY:

Based on the history, the patient's symptoms were causally related to the accident of 9/04/00.

ACTIVITY RESTRICTIONS:

The patient has no restrictions at this time. She is working full duty and missed only a few days from work.

FURTHER TREATMENT:

At this time, the patient does not require any further orthopedic care.

DISABILITY:

The patient has no disability. She can do all the activities of daily living."

In his affirmation, Dr. Needelman, reports of his MRI reviews:

"Kelly Burch:

MRI of the Cervical Spine 9/12/00:

MRI evaluation of the cervical spine was performed utilizing sagittal T1 weighted and T2 weighted images and axial gradient echo imaging with T2 weighting.

The marrow signal is preserved without evidence of bone bruise or contusion. The cervical cord maintains normal signal on this noncontrast evaluation. There is no tonsillar ectopia. The visualized paravertebral soft tissue structures are intact.

There is reversal of the usual cervical lordosis. The bodies are aligned. The intervertebral disc height and signal is fairly well maintained throughout.

At C2-3 and C3-4, there are no posterior disc abnormalities. There is no central or foraminal stenosis.

At C4-5, there is the apex of the reversal of the cervical lordosis. There is a minimal posterior disc bulge, which minimally flattens the ventral thecal sac without cord deformity or central canal stenosis. There is no disc herniation. The neural foramina are wide patent bilaterally.

The C5-6, C6-7 and C7-T1 levels are normal.

Impression:

Reversal of the usual cervical lordosis, which is most often secondary to positioning but can also be secondary to muscular spasm for which clinical correlation is advised. At the apex at C 4-5, there is a minimal posterior disc bulge, which mildly flattens the ventral thecal sac. There is no nerve root impingement, cord flattening, nor central canal stenosis.

The remaining levels are unremarkable without evidence of disc herniation or foraminal stenosis.

Ward Pickow:

MRI of the lumbosacral spine 11/29/00:

MRI evaluation of the lumbosacral spine was performed utilizing sagittal and axial T1 weighted images and sagittal T2 weighted images.

There is no evidence of acute or chronic compression fracture. No geographic high signal changes are identified to suggest a bone bruise. The vertebral bodies are aligned and the lumbar lordosis is maintained. There is mild straightening of the lumbosacral spine.

The intervertebral disc height and signal is well maintained throughout from L1-2 through L3-4 without significant posterior disc herniation. There is no central or foraminal stenosis.

At L4-5 and L5-1, the intervertebral disc height is maintained. There is diffuse disc dehydration secondary to chronic degenerative disc disease. There are mild posterior disc bulges, which mildly efface the ventral thecal sac. However, no nerve root impingement is documented. There is no central canal stenosis. The neural foramina are not significantly narrowed.

Impression:

Mild chronic degenerative disc disease at L4-5 and L5-1 manifested as disc desiccation and mild posterior disc bulges. No disc herniation is delineated. No central or foraminal stenosis."

The hereinabove set forth evidence submitted by the Defendants satisfied the Defendants' initial burden of demonstrating that the Plaintiffs did not sustain a statutorily defined "serious injury."

When a claim is raised under the "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," then, in order 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 is acceptable. (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].) In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. (Toure v. Avis Rent A Car System, Inc., *supra*.)

In opposition to the motion, the Plaintiffs have submitted, inter alia, the affirmations of their treating physician, Sunil Butani, M.D..

In his affirmation, dated November 25, 2003, Dr. Butani states with respect to the Plaintiff, Ward Pickow:

"That plaintiff, WARD PICKOW, has been under my care from October 26, 2000, until the present and continuing for serious personal injuries sustained as a result of a motor vehicle accident which occurred on September 4, 2000. Prior to seeing me, Mr. Pickow had treated with Dr. Joseph Russo, and was treated for emergency care on the date of the motor

vehicle accident at North Shore University Hospital at Glen Cove.

Mr. Pickow appeared initially on October 26, 2000, for treatment related to the motor vehicle accident complaining of low back and neck pain. The patient stated that he was a driver in a car which was hit in the rear end by another motor vehicle.

That as a result of the accident of September 4, 2000, Mr. Pickow has sustained a significant and permanent restriction in the normal range of motion of both his cervical and lumbar spine. Mr. Pickow appears to be a reliable historian of his past physical condition. From the history given by Mr. Pickow, it is clear that he did not have any similar injuries still existing prior to the motor vehicle accident of September 4, 2000.

Initial physical examination of Mr. Pickow revealed tenderness across the cervical and lumbosacral paraspinals with restricted range of motion. The examination also revealed that the Straight Leg Raising bilaterally was 70 degrees and DTRs in the upper extremities are 2+ and symmetrical.

Range of motion testing of his lumbar spine utilizing an arthroidal protractor indicated the following significant restrictions of motion, ...

LUMBAR RANGE OF MOTION TESTING OF NOVEMBER 7, 2000:

<u>Examination</u>	<u>Measurment</u>	<u>Normal</u>
Flexion	80	90
Extension	16	30
Left Rotation	20	30
Right Rotation	20	30
Left Lateral Flexion	14	20
Right Lateral Flexion	14	20

On this November 7, 2000 examination, the cervical spine of Mr. Pickow exhibited significant reductions. The lumbar examination revealed the following: flexion reduced by 11.11%, extension reduced by 46.67%, left rotation reduced by 33.33%, right rotation reduced by 33.33%, left lateral flexion reduced by 30% and right lateral flexion reduced by 30%. Given the patient's history and my examination, it is my opinion within a reasonable degree of certainty that this is a significant restriction which was caused by the motor vehicle accident which occurred on September 4, 2000.

That on February 20, 2001, I performed an evaluation of Mr. Pickow. He has continued neck and low back pain along with tenderness of the cervical and lumbar spine. Given the patient's history and my examination, it is my opinion within a reasonable degree of certainty that this is a significant restriction which was caused by the motor vehicle accident which occurred on September 4, 2000.

I considered him to be totally disabled/incapacitated from the date of the accident. He remains partially disabled to date and should not engage in any substantial physical activity.

* * *

I performed a comprehensive re-evaluation of Mr. Pickow's condition on November 13, 2003, and have diagnosed him with chronic pain affecting the neck and lower back with restricted range of motion of the cervical and lumbar spine. The following tests were positive on November 13, 2003: Straight leg raise is positive bilaterally and is 30 degrees. Mr. Pickow's re-evaluation of November 13, 2003 also revealed tenderness and spasm across the cervical and lumbar spine, side bending is restricted and is 20 degrees, normal is 60 to 90 degrees, rotation is restricted to 15 degrees, normal is 60 degrees. Flexion is 40 degrees, normal is 90 degrees and deep tendon reflexes is 2+ and symmetrical.

That on November 13, 2003, I performed range of motion testing to the cervical

and lumbar spine utilizing an arthroidal protractor which indicated the following significant restriction of motion, which were analyzed in comparison to the AMA guidelines:

LUMBAR RANGE OF MOTION TESTING OF NOVEMBER 13, 2003

<u>Examination</u>	<u>Measurement</u>	<u>Normal</u>
Flexion	40	90

CERVICAL RANGE OF MOTION TESTING OF NOVEMBER 13, 2003

Rotation	15	60
Side bending	20	60-90

That on physical re-evaluation of November 13, 2003, Mr. Pickow's lumbar spine revealed the following reduction in range of motion. Flexion was reduced by 55.56%. That on physical re-evaluation of November 13, 2003, Mr. Pickow's cervical spine revealed the following reduction in range of motion. Side bending was reduced by 66.67% and Rotation was reduced by 75%. From the history given and my treatment, within a reasonable degree of medical certainty, these range of motion deficits in the spine were caused by the accident of September 4, 2000 and still exists today, more than three (3) years later.

* * *

From the history given by Mr. Pickow and my examinations and treatment of him, I conclude within a reasonable degree of medical certainty that the injuries of the herniated discs at C3-4 and C5-6 and bulging discs at C4-5 and C6-7, confirmed by MRI, C5-6 radiculopathy on both sides with 1+ positive sharp waves in the right, confirmed by Needle EMG, Bulging discs at L4 through S1, confirmed by MRI and L5-S1 radiculopathy with 1+ PSWs in the right, confirmed by Needle EMG are permanent and proximately caused by the motor vehicle accident of September 4, 2000."

In his affirmation, dated November 25, 2003, Dr. Butani states with respect to the Plaintiff, Kelly Burch:

“That plaintiff, KELLY BURCH, has been under my care from October 12, 2000, until the present and continuing for serious personal injuries sustained as a result of a motor vehicle accident which occurred on September 4, 2000. Prior to seeing me, Ms. Burch had treated with John M. Stewart III, M.D., and was treated for emergency care on the date of the motor vehicle accident at North Shore University Hospital at Glen Cove.

Ms. Burch appeared initially October 12, 2000, for treatment related to the motor vehicle accident complaining of severe neck pain, upper back pain, low back pain shooting down the left lower extremity, tingling and numbness in the right pinky and the right little finger and severe headaches. The patient stated that she was a passenger in a car which was hit in the rear end by another motor vehicle.

* * *

Initial physical examination of Ms. Burch revealed sever spasm and tenderness across the lumbosacral and cervical spine along with pain and reduced range of motion. The Straight Leg Raise test was positive on the left being 20 degrees and on the right being 90 degrees. There is diminished sensation in right C5-6 and C6-7 distribution. There is cervical and lumbar radiculopathy and DTRs in the upper extremities are 2+ and symmetrical. There is also tenderness, pain and reduced range of motion of the thorasic spine.

Range of motion testing of her spine utilizing an arthroidal protractor indicated the following significant restrictions of motion, which were analyzed in comparison to the AMA guidelines on her visit of October 24, 2000:

CERVICAL RANGE OF MOTION TESTING OF OCTOBER 23, 2000

<u>Examination</u>	<u>Measurement</u>	<u>Normal</u>
Flexion	7	45
Extension	35	45
Right Lateral Flexion	20	45
Left Later Flexion	20	45
Right Rotation	20	80
Left Rotation	24	80

On this October 23, 2000 examination, both the cervical and lumbar spine of Ms. Burch exhibited significant reductions. The Cervical examination revealed the following: flexion reduced by 84.44%, extension reduced by 22.22%, right lateral flexion reduced by 55.56%, left lateral flexion reduced by 55.56%, right rotation reduced by 75% and left rotation reduced by 70%. The lumbar examination revealed the following: straight leg raise was positive on the left. Given the patient's history and my examination, it is my opinion within a reasonable degree of certainty that this is a significant restriction which was caused by the motor vehicle accident which occurred on September 4, 2000.

* * *

I performed a comprehensive re-evaluation of Ms. Burch's condition on November 13, 2003, and have diagnosed her with chronic low back pain syndrome. The following tests were positive on November 13, 2003: Straight leg raise is positive bilaterally and is 30 degrees and range of motion of the lumbosacral spine is still restricted in flexion. Ms. Burch's re-evaluation of November 13, 2003 also revealed spasms and tenderness across the lumbosacral spine with restricted range of motion in flexion and deep tendon reflexes is 2+ and symmetrical.

That on November 13, 2003, I performed range of motion testing to the lumbar spine utilizing an arthroidal protractor which indicated the following significant restrictions of motion, which were analyzed in comparison to the AMA guide lines:

LUMBAR RANGE OF MOTION TESTING OF NOVEMBER 13, 2003

<u>Examination</u>	<u>Measurement</u>	<u>Normal</u>
Flexion	30	90

That on physical re-evaluation of November 13, 2003, Ms. Burch's lumbar spine revealed the following reductions in range of motion. Flexion was reduced by 66.67%. From the history given and my treatment, within a reasonable degree of medical certainty, these range of motion deficits in the spine were caused by the accident of September 4, 2000 and still exists today, more than three (3) years later.

* * *

From the history given by Ms. Burch and my examinations and treatment of her, I conclude within a reasonable degree of medical certainty that the injuries of the Bulging disc at C4-5 and C5-6, confirmed by MRI, Cervical radiculopathy, confirmed by Needle EMG, Bulging disc at L5-S1 and at T11-T12, confirmed by MRI and Lumbar radiculopathy the Needle EMGs revealed lumbar radiculopathy with 1+ PSWs in the left L5-S1 distribution and cervical radiculopathy are permanent and proximately caused by the motor vehicle accident of September 4, 2000."

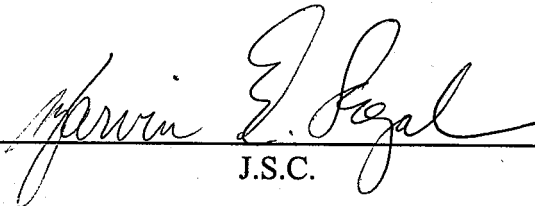
On close examination, the affirmations submitted by the Plaintiffs' treating physician set forth the objective examinations, tests and review of medical records which were performed to support his conclusion that the Plaintiffs suffer from significant injuries. Clearly, the Plaintiff's expert's conclusions are not based solely on the Plaintiffs' subjective complaints of pain, and therefore are sufficient to defeat the motion. (DiLeo v. Blumberg, 250 AD2d 364,

672 N.Y.S.2d 319 [1st Dept. 1998]).

The Plaintiffs have met their burden of producing evidence of physical limitations. In this regard, the opposing affidavits submitted by the Plaintiffs' treating physician regarding the Plaintiffs' conditions, which were based on objective medical observation, as well as objective testing, are sufficient to create an issue of fact as to whether the Plaintiffs suffered "serious injury." The doctor details the Plaintiffs' symptoms, including recurring pain and limitation of movement, and further concludes that the conditions are permanent. Under these circumstances, an issue of fact as to the existence of a "serious injury" within the meaning of Insurance Law Section 5102(d) is presented. (Toure v. Avis Rent A Car Systems, Inc., supra.)

ENTER:

Dated: Mineola, New York
December 11, 2003



J.S.C.

ENTERED

DEC 17 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE