

Fishburne v State of New York
2013 NY Slip Op 33971(U)
September 25, 2013
Court of Claims
Docket Number: 119146
Judge: Judith A. Hard
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK COURT OF CLAIMS

JACQUELYN FISHBURNE,

Claimant,

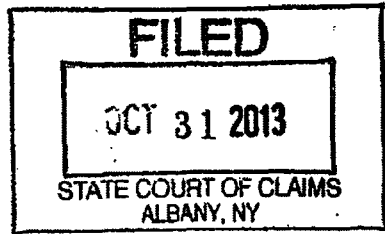
DECISION AND ORDER

-v-

THE STATE OF NEW YORK,¹

**Claim No. 119146
Motion No. M-83106**

Defendant.



**BEFORE: HON. JUDITH A. HARD
Judge of the Court of Claims**

**APPEARANCES: For Claimant:
Law Offices of David J. Clegg, Esq. & Associates
By: David J. Clegg, Esq.**

**For Defendant:
Hon. Eric T. Schneiderman, NYS Attorney General
By: Joan Matalavage, Assistant Attorney General,
Of Counsel**

Claimant Jacquelyn Fishburne commenced the underlying claim seeking damages for a number of injuries that she alleges occurred as a result of an August 24, 2010 motor vehicle accident between claimant's vehicle and a vehicle driven by a New York State Trooper. Defendant now moves for summary judgment on the sole ground that claimant did not sustain a "serious injury" as defined by Insurance Law § 5102 (d) and, thus, cannot maintain a claim for her alleged personal injuries. Claimant opposes the motion on the grounds that defendant failed to make its prima facie showing of entitlement to judgment as a matter of law, or alternatively,

¹ Caption amended to reflect the only properly named defendant.

even if defendant did meet its initial burden on the motion, claimant's responding papers raise material questions of fact that require a trial. For the reasons set forth below, defendant's motion is denied.

On August 24, 2010, claimant was stopped in the southbound lane intending to make a left turn into a residential driveway on Route 209 in Kerhonkson, New York. At this location, Route 209 has one southbound lane and one northbound lane for traffic. New York State Investigator Thomas Fortuna was traveling southbound towards a third vehicle that was stopped behind claimant's vehicle. Investigator Fortuna pulled his vehicle into the northbound lane as claimant was in the middle of her left turn. Consequently, Investigator Fortuna struck the front driver's side of claimant's vehicle.

Claimant alleges that the force of the impact caused her right hand to jam into the manual gear shift arm. She alleges the following injuries in her Amended Verified Bill of Particulars:

- right wrist ulnar styloid fracture
- nerve damage
- loss of range of motion or right wrist
- loss of use of right wrist
- abnormal sudomotor activity in right arm
- pathological changes in bone and skin of right arm
- extreme sensitivity to touch of right arm
- mental and emotional distress
- reflex sympathetic dystrophy
- complex regional pain syndrome (CRPS)
- muscle wasting
- contracture of muscles and tendons in right arm
- traumatic arthritis
- causalgia
- chronic pain
- changes to skin color
- loss of enjoyment of life

(Defendant's Affirmation in Support, at Exhibit C, ¶ 15).

Claimant was taken to Ellenville Regional Hospital immediately after the accident (Affirmation in Support, at Exhibit F). She complained of pain in her right arm (Id.). x-rays taken at the emergency room revealed a non-displaced ulnar styloid fracture in her right wrist (Id.). The following day, she presented to Kingston Hospital with continued pain in her right wrist. (Affirmation in Support, at Exhibit G). She underwent x-rays again that confirmed she had a non-displaced fracture in the distal ulnar styloid in her right wrist (Id.). Claimant began treatment with orthopedic surgeon Dr. Mark Aierstok of Orthopedic Associates of Dutchess County on August 27, 2010 (Affirmation in Support, at Exhibit E, bates number 58). Dr. Aierstok diagnosed claimant with a right wrist ulnar styloid fracture (Id.). Dr. Joseph Carfi examined claimant on September 20, 2012 (Affirmation in Opposition, at Exhibit 2). Claimant complained of constant pain in the right wrist, hand and forearm (Id.). He diagnosed claimant with complex regional pain syndrome type I (Id.).

As stated above, defendant's basis for relief on this motion is that claimant failed to sustain a "serious injury" as defined in section 5102 of the Insurance Law and, thus, the claim for personal injuries should be dismissed. Claimant was involved in a prior motor vehicle accident in 2006 where she sustained a fracture to her right wrist (Carfi Report p 3 attached to Carfi Affirmation). Defendant highlights that claimant alleged she suffered the same ulnar styloid fracture in a prior lawsuit filed as a result of the 2006 motor vehicle accident (see Verified Bill of Particulars dated July 26, 2007, annexed to defendant's Affirmation in Support as Exhibit D, at ¶ 4). Defendant contends that the fracture in her right wrist and the allegedly resulting complex regional pain syndrome are attributable not to the August 24, 2010 motor vehicle accident, but from injuries she alleged she sustained in 2006.

Summary judgment is a drastic remedy which should not be granted unless it is clear that there are no triable issues of fact (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The Court's function in a motion for summary judgment is not to resolve issues of fact, but to determine whether issues of fact exist (*see Barr v County of Albany*, 50 NY2d 247 [1980]). The proponent of a motion for summary judgment must make a showing of prima facie entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Failure to make such a showing requires denial of a summary judgment motion, regardless of the sufficiency of the opposing party's papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, the burden shifts to the opponent of the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The evidence must be viewed in the light most favorable to the opponent of the motion, and that party should be given every favorable inference (*see McKinnon v Bell Sec.*, 268 AD2d 220 [1st Dept 2000]).

In New York State, a covered person² may not recover for non-economic loss against another covered person, for personal injuries arising out of a motor vehicle accident, except where a serious injury has been sustained (Insurance Law § 5104 [a]). Accordingly, in order to recover for non-economic loss against defendant, a claimant is required to plead and prove that she sustained a serious injury as defined by Insurance Law § 5102 (d) (*Zecca v Riccardelli*, 293 AD2d 31 [2d Dept 2002]; *Licari v Elliott*, 57 NY2d 230, 235 [1982]).

² A "covered person" is defined in section 5102 (j) of the Insurance Law as "any pedestrian injured through the use or operation of, or any owner, operator or occupant of, a motor vehicle which has in effect the financial security required" by the Vehicle and Traffic Law.

A "serious injury" is defined in section 5102 (d) of the Insurance law as:

"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."

On a motion for summary judgment, where the issue is whether claimant has sustained a serious injury within the meaning of Insurance Law § 5102 (d), defendant bears the initial burden of establishing, through the submission of competent medical evidence, that claimant did not suffer a serious injury causally related to the accident (Gaddy v Eyler, 79 NY2d 955, 956-957 [1992]). In doing so, defendant may rely on the medical records and reports prepared by claimant's treating physicians (Franchini v Palmieri, 1 NY3d 536 [2003]; Cody v Parker, 263 AD2d 866 [3d Dept 1999]). If the initial burden is met by defendant, the burden shifts to claimant to produce sufficient evidence to overcome defendant's motion by demonstrating that claimant sustained a serious injury within the meaning of the No-Fault Insurance Law (Gaddy, 79 NY2d at 957). The evidence submitted must be based upon objective medical findings and diagnostic tests, so as to create a genuine triable issue of fact concerning the existence of a serious injury (John v Engel, 2 AD3d 1027 [3d Dept 2003]; Trotter v Hart, 285 AD2d 772, 773 [3d Dept 2001]).

Defendant contends that claimant has not met the "serious injury" threshold issue because she alleges the same right wrist-ulnar styloid fracture which she allegedly suffered as a result of her 2006 accident. Hence, her fracture existed at the time of her August 24, 2010 accident and

she was still receiving treatment for this pre-existing injury. Defendant also argues that claimant's alleged complex regional pain syndrome and complaints of pain do not satisfy the "serious injury" threshold. In support of the motion, defendant has provided the Court with extensive medical records pertaining to claimant's orthopedic and other medical treatments from 2006 to the present, as well as the affidavit and independent medical examination report of Robert C. Hendler, M.D., a board certified orthopedic surgeon, who provided defendant with an evaluation of claimant and her medical history following the 2006 and 2010 accidents (Defendant's Exhibit N).

In his independent medical examination (IME) reports, Dr. Hendler states that he reviewed all of claimant's medical records, including x-rays taken of her right wrist from Ellenville Regional Hospital and Kingston Hospital (Affirmation in Support, at Exhibit N, ¶ 2). Dr. Hendler notes that he previously examined claimant after her motor vehicle accident in 2006 (Id.). He reviewed claimant's medical records from the time of her 2006 accident, including an x-ray of her right wrist taken on June 5, 2006 that showed an ulnar styloid fracture, through her treatments relating to the injuries alleged in this action (Dr. Hendler's 11/19/12 report, annexed to Exhibit N, at Exhibit 2). Dr. Hendler noted that claimant underwent arthroscopy surgery on her right wrist on April 27, 2011 by Dr. Ristic at Orthopedic Associates of Dutchess County (Id.).

Dr. Hendler examined claimant on November 14, 2012, and took an x-ray of both of her wrists (Id.). He noted a lucency in the tip of the ulnar styloid in her right wrist but it did not appear to be a fracture (Id.). He stated this lucency was identical to what was seen in the 2006 and 2010 x-rays taken at Orthopedic Associates of Dutchess County (Id.). Dr. Hendler opined that the alleged new right wrist fracture pre-existed the 2010 motor vehicle accident, and that this fracture was present in the imaging studies taken after her prior accident in 2006 (Exhibit N, at ¶

4). Dr. Hendler also opined that claimant did not have complex regional pain syndrome in her right wrist (Id.).

Defendant also submitted medical records from claimant's primary care physician and pediatrician that indicate that she complained of paresthesia in her upper extremities in 2007, and numbness and tremors in her right hand and wrist in 2008 and 2009, respectively (Reply Affidavit, at Exhibits A-1, bates number 5 and 13, and B-1, bates number 7).

The Court finds that defendant met its burden through medical records that claimant did not suffer a serious injury causally related to the motor vehicle accident that occurred on August 24, 2010. Defendant sufficiently raised enough doubt that the alleged fractured right wrist in 2010 preexisted the 2010 motor vehicle accident. (Dabiere v Yager, 297 AD2d 831 [3d Dept 2002]). The burden shifts to claimant to present "competent medical evidence based upon objective medical findings and tests to support [the] claim of serious injury and to connect the condition to the accident (citations omitted) (Franchini v Palmieri, 307 AD2d 1056 [3d Dept 2003]).

In opposition, claimant presents her own affidavit as well as the affirmations of her treating physicians, Dr. Mark Aierstock and Dr. Joseph Carfi (Affirmation in Opposition, at Exhibits 1 and 2). Claimant attests that the impact from the accident with Trooper Fortuna's vehicle was severe and her right hand was jammed into her vehicle's gear shifter (Claimant's Affidavit, at ¶ 2). She complained of pain in her right wrist and was told she had a fracture in her right wrist at both Ellenville and Kingston Hospitals (Id.). She began orthopedic treatment with Dr. Aierstock a few days after the accident who put a cast on her wrist for a month followed by a wrist brace (Id., at ¶ 3). She underwent arthroscopic surgery in April of 2011 but the pain in her wrist only got worse (Id., at ¶ 4). She was referred to a pain management doctor, Dr. Virk, with

whom she continues treatment, but the pain and dysfunction in her wrist, including burning, numbness, tingling, swelling, stiffness and spasms, have only worsened over time (Id., at ¶ 5).

Claimant acknowledged that she previously fractured her right wrist in a motor vehicle accident in 2006 (Id., at ¶ 2). She stated that her prior wrist fracture healed completely within a few months after that accident and she had no pain or problems from that fracture prior to the motor vehicle accident on August 24, 2010 (Id.).

Claimant's orthopedist, Dr. Aierstock, affirmed that he examined claimant on August 27, 2010, confirmed she had a nondisplaced ulnar styloid fracture, and placed a short cast on her right arm and wrist (Affirmation in Opposition, at Exhibit 1, ¶ 2). He examined claimant again on September 24, 2010, and took an x-ray that revealed her fracture was healing (Id., at ¶ 3). Dr. Aierstock examined claimant next on November 16, 2010, and x-rays taken revealed that her ulnar styloid fracture was healed (Id., at ¶ 4). Dr. Aierstock reviewed all of claimant's right wrist treatment records and x-rays from 2006 to the present, as well as Dr. Hendler's report and affirmation. His conclusion was that claimant's nondisplaced ulnar styloid fracture that he treated was a new fracture caused solely by the motor vehicle accident on August 24, 2010, and which had subsequently healed with immobilization after approximately three months (Id., at ¶¶ 6 and 7).

Dr. Aierstock acknowledged that claimant suffered a prior fracture in her right wrist in 2006, but he stated it had healed and no record of any right wrist complaints were noted in her medical records from June 5, 2006 up to the accident on August 24, 2010 (Id., at ¶ 7). He disagreed with Dr. Hendler's opinion that her fracture preexisted the latter accident and stated no medical evidence supported Dr. Hendler's opinion (Id.).

Claimant's physiatrist, Dr. Carfi, affirmed that he examined her on September 20, 2012, reviewed her various medical records and x-rays from 2006 to the present, and it was his medical opinion that she sustained an ulnar fracture caused by the motor vehicle accident on August 24, 2010, which subsequently resulted in a diagnosis of and complications relating to Complex Regional Pain Syndrome Type I (CRPS) (Affirmation in Opposition, at Exhibit 2, ¶ 2). Dr. Carfi stated that his examination found claimant's right wrist ranges of motion were reduced by 10° as compared to the ranges of motion in her left wrist (Id., at ¶ 6).³ Dr. Carfi disagreed with Dr. Hendler's opinion that claimant did not have CRPS and concluded that her condition was permanent, debilitating and restricted her ability to use her dominant right hand (Id., at ¶¶ 8 and 9).

Dr. Carfi acknowledged, in his medical report dated November 6, 2012, that claimant suffered major fractures in her lower limbs as a result of a motor vehicle accident in 2006 (Carfi Report, annexed to Affirmation in Opposition, at Exhibit 2, p 3). He specifically noted that during her rehabilitation from her lower extremity injuries in the 2006 accident, claimant used crutches which caused pain in her right wrist, but all symptoms had resolved, including her fracture, prior to the August 24, 2010 motor vehicle accident (Id.).

It is clear that the parties do not dispute that claimant sustained a right wrist fracture as a result of her 2006 motor vehicle accident. The Court finds that claimant's affidavit and the affirmations from her treating physicians, which state that her prior right wrist fracture from 2006 was healed, directly contradicts defendant's expert's affirmation that the fracture pre-existed the August 24, 2010 accident. This is sufficient competent and objective evidence that raises an issue

³ Claimant is right-hand dominant (Affirmation in Opposition, at Exhibit 2, ¶ 6).

of fact whether the proximate cause of her right wrist ulnar styloid fracture alleged in this action was the motor vehicle accident on August 24, 2010 (Franchini v Palmieri, 307 AD2d 1056 [3d Dept 2003]). Although defendant's expert affirmation, medical reports and other relevant evidence are compelling, questions of fact remain whether claimant's wrist fracture is a "serious injury" as defined by Insurance Law § 5102 (d), and was caused by the August 24, 2010 or the 2006 accident which precludes summary judgment dismissing the claim.

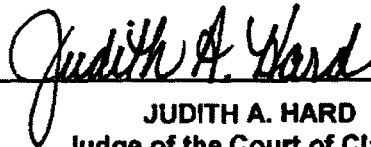
The Court would benefit from the direct and cross-examination of all the experts as to the healing process for a wrist fracture and their reviews of the x-rays with the Court at trial. In his affirmation and IME report, Dr. Hendler did not address whether claimant's prior fracture could have fully healed before the 2010 accident, whether she may have only exacerbated a healed wrist fracture, how likely it is for a significantly similar or identical wrist fracture to occur approximately four years after an initial fracture, and whether claimant's complaints of right hand tremors, numbness and paresthesia in between the two accidents may have resulted from continued use of crutches while recovering from her prior hip and leg fractures, as Dr. Carfi mentioned in his report, or as permanent lingering symptoms of her 2006 wrist fracture.

Since the Court finds claimant raised an issue of fact regarding the cause of her fracture, the issue of whether her alleged CRPS may qualify as a "serious injury" under the statute need not be decided on this motion. A claimant who establishes a prima facie case that any of her injuries resulting from a motor vehicle accident were "serious" as defined by Insurance Law § 5102 (d) may recover for all injuries proximately caused by the accident (Preston v Young, 239 AD2d 729 [3d Dept 1997]; O'Neill v O'Neill, 261 AD2d 459 [2d Dept 1999]). The Court notes that claimant has a significant burden at trial to establish that her right wrist fracture was caused by the 2010 accident and that it did not preexist or become merely exacerbated by such accident.

If she is successful, then she also faces the additional burden of connecting the causation of her CRPS to the wrist fracture and the August 24, 2010 motor vehicle accident.

In light of the foregoing, claimant raised an issue of fact whether she sustained an ulnar styloid fracture in her right wrist as a result of the August 24, 2010 motor vehicle accident with Trooper Fortuna and, accordingly, defendant's motion for summary judgment to dismiss the claim is denied.

Albany, New York
September 25, 2013



JUDITH A. HARD
Judge of the Court of Claims

Papers considered:

1. Notice of Motion for Summary Judgment, dated March 7, 2013, and Affidavit of Joan Matalavage, AAG, in Support of Defendant's Motion for Summary Judgment and Memorandum of Law, dated March 7, 2013, with Exhibits.
2. Affirmation of David J. Clegg, Esq. in Opposition to Defendant's Motion for Summary Judgment, dated April 9, 2013, with Exhibits.
3. Reply Affidavit of Joan Matalavage, AAG, dated April 17, 2013, with Exhibits.