

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

ROMAN STROCKYJ,	:	
	:	
Plaintiff	:	
	:	
vs.	:	No. 13-1985
	:	
WAYNE E. NOTHSTEIN	:	
DONNA M. NOTHSTEIN	:	
	:	
Defendants	:	

John J. Zettlemoyer, Jr., Esquire	Counsel for Plaintiff
Michael P. Shay, Esquire	Counsel for Defendants

**MEMORANDUM OPINION**

Matika, J. - December , 2015

Before this Honorable Court is a Motion for Partial Summary Judgment filed by Defendants Wayne & Donna Nothstein (hereinafter "Defendants") on the basis that Roman Strockyj (hereinafter "Plaintiff") has failed to pierce the limited tort threshold and establish a serious injury as defined in, and in accordance with, 75 Pa.C.S.A. § 1705. After argument on the matter and a review of the briefs, for the reasons stated within this opinion, Defendants' Motion for Partial Summary Judgment is **GRANTED.**

**FACTUAL AND PROCEDURAL BACKGROUND**

On September 27, 2011, near the intersection of Pennsylvania State Route 209 and Pennsylvania State Route 248, in Franklin Township, Carbon County, Pennsylvania, Plaintiff was

operating a motor vehicle which was struck from behind by a motor vehicle operated by Defendant Wayne Nothstein and owned by Defendant Donna Nothstein. As a result of the accident, Plaintiff was transported to the Blue Mountain Health Center in Palmerton, where he was treated for injuries and told to follow up with his primary care physician.

Plaintiff arrived at the hospital in Palmerton complaining of neck and chest pain. CT Scans of Plaintiff's head, neck, and back revealed no acute injuries, but did confirm the presence of existing degenerative changes in Plaintiff's neck and spine. Plaintiff, through his own admission, stated that he had been experiencing neck and head pain before the accident<sup>1</sup>, though he claimed the pain after the accident was "much different" after the accident.<sup>2</sup>

At the time of the accident, Plaintiff had a personal automobile insurance policy, under which he elected to take the limited tort coverage option.

Defendants have filed this Motion for Partial Summary Judgment, arguing to the Court that Plaintiff has failed to establish that his injuries sustained were of the nature to be considered a "serious injury" in order to pierce the threshold necessary to recover noneconomic losses under a limited tort policy pursuant to 75 Pa. C.S.A. § 1705.

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<sup>1</sup> Strockyj Dep. 35:19-48:19, February 25, 2015.

<sup>2</sup> Strockyj Dep. 42:22.

## DISCUSSION

A trial court may grant a motion for summary judgment whenever there are no genuine issues of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report. Pa. R.C.P. 1035.2. In response, the non-moving party must demonstrate that there is a genuine issue for trial and cannot rest upon the mere allegations and denials of his pleadings. *Phaff v. Gerner*, 303 A.2d 826, 829 (Pa. 1973); *Davis v. Resources for Human Development, Inc.*, 770 A.2d 353, 357 (Pa. Super. Ct. 2001). The non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that the jury could return a verdict favorable to the non-moving party. Pa. R.C.P. 1035.2.

In granting a motion for summary judgment, the trial court must determine "whether the admissible evidence in the record, in whatever form, from whatever source, considered in the light most favorable to the [non-moving party] to the motion, fails to establish a prima facie case or defense" to allow the case to continue to trial. *Liles v. Balmer*, 567 A.2d 691, 692 (Pa. Super. Ct. 1989). Therefore, a court may grant summary judgment based upon an evidentiary record that either shows the material facts are undisputed, or contains insufficient evidence of facts

to make out a prima facie cause of action or defense. *Basile v. H & R Block, Inc.*, 777 A.2d 95, 100 (Pa. Super. Ct. 2001).

Pursuant to Pennsylvania Rule of Civil Procedure 1035.2, if a defendant is the moving party, the defendant "may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action." *Rauch v. Mike-Mayer*, 783 A.2d 815, 824 (Pa. Super. Ct. 2001) (citing Pa.R.C.P. 1035.2(2)).

In Pennsylvania, a plaintiff who has elected the limited tort alternative coverage under his or her respective insurance policy is precluded from maintaining an action for any noneconomic loss unless that plaintiff has sustained a "serious injury". 75 Pa. C.S.A. § 1705(d).<sup>3</sup>

Serious injury is defined as "death, serious impairment of body function, or permanent serious disfigurement." 75 Pa. C.S.A. § 1702.<sup>4</sup> In the summary judgment context, the Court must determine whether Defendants, as the moving party, have established the fact that Plaintiff, Roman Strockyj, has not suffered a serious injury as defined by the Pennsylvania statute and case law.

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<sup>3</sup> There are some exceptions to this general rule but none are applicable to the situation before the Court.

<sup>4</sup> As neither death nor permanent serious disfigurement are at issue in this matter, the Court will only examine serious impairment of body function.

The court, in its determination of whether a plaintiff has sustained a serious impairment of body function, must focus not on the injury itself, but rather on how the injury has affected the particular body function. *Long v. Mejia*, 896 A.2d 596, 600 (Pa. Super. Ct. 2006). As the appellate courts have stated in numerous cases, "serious impairment of body function" determinations involve a two-step inquiry:

1) What body function, if any, was impaired because of the injuries sustained in the motor vehicle accident?

2) Was the impairment of body function serious?

*Washington v. Baxter*, 719 A.2d 733, 740 (Pa. 1998) (citing *DiFranco v. Pickard*, 398 N.W.2d 896, 901 (Mich. 1986)).

In examining the first prong of this two-step analysis, Strockyj claims that as a result of the accident, he suffered, and still suffers from, very severe headaches that consist of a shooting pain at the base of his head and continuing up through his forehead into his ocular region. Strockyj further claims that the direct consequence of such headaches was that he had, and continues to have, trouble sleeping, which has impaired his ability to maintain a normal life.

The second prong of this Court's analysis, the seriousness of the impairment of any bodily function, requires a greater scrutiny of the facts. In determining if the impairment of a particular body function is of the serious nature required under

the statute, there are certain factors a court must examine. The *Washington* court lists these factors as: 1) extent of impairment; 2) particular body function impaired; 3) length of time impairment lasted; 4) treatment required to correct impairment; and 5) any other relevant factors. *Washington*, 719 A.2d at 740.

"We remain cognizant of the principle that '[a]n impairment need not be permanent to be serious' under section 1705(d)." *Cadena v. Latch*, 78 A.3d 636, 640 (Pa. Super. Ct. 2013), quoting *Robinson v. Upole*, 750 A.2d 339, 342 (Pa. Super. Ct. 2000). The impairment needs to interfere substantially with Strockyj's normal activities and not impose only mild to slight limitations. *Dodson v. Elvey*, 665 A.2d 1223, 1234 (Pa. Super. Ct. 1995) *rev'd on other grounds*, 720 A.2d 1050 (Pa. 1998). "Generally, medical testimony will be needed to establish the existence, extent, and permanency of the impairment." *Hellings v. Bowman*, 744 A.2d 274, 276 (Pa. Super. Ct. 1999). Thus, the question that needs to be answered is not whether Plaintiff has adduced sufficient evidence to show that Strockyj has suffered any injury, but rather whether Strockyj has suffered a serious injury such that a body function has been seriously impacted. *Washington*, 719 A.2d at 741.

In applying these factors to the case *sub judice*, the Court concludes that reasonable minds could not differ on the

conclusion that Strockyj's injury was not serious. As stated previously, the extent of Strockyj's injuries were headaches and neck pain. He also stated that he had experienced chest pain from a bruise he received during the accident, but that quickly subsided.<sup>5</sup>

When he was taken to the hospital, Plaintiff was given painkillers and a CT scan of his spine and his head, and then discharged approximately three to four hours later. He was given no special instructions, no restrictions, and was not referred for any other treatment or to any type of specialist. Plaintiff stated he went to his family doctor, Dr. Ruth Frye, about a week after the accident, October 3, 2011, where he was prescribed more painkillers and sent to physical therapy at Phoenix Rehabilitation in Lehighton. Strockyj, by his own admission, stated that he stopped attending the recommended physical therapy that his treating physician referred him to for pain relief because he felt it was not helping him.<sup>6</sup> Plaintiff also averred that other than his primary care physician and Phoenix Rehabilitation, he has not sought any other medical services or treatment for his neck and head pain.

Further, Plaintiff stated that had been suffering from, and been treated for, neck pain prior to this motor vehicle

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<sup>5</sup> Strockyj Dep. 35:10 - 35:18, February 25, 2015.

<sup>6</sup> Strockyj Dep. 43:20 - 45:7, February 25, 2015.

accident.<sup>7</sup> Additionally, Plaintiff admitted that he injured his back in October of 2012, a year after the accident, when he was either mowing his lawn or "cutting wood".<sup>8</sup> Plaintiff also averred that the pain from this accident caused him to drop classes he was taking at Lehigh-Carbon Community College ("LCCC"), but he later admitted that there were other reasons for his dropping out of at least some of those classes, such as a class in the Spring of 2012 being "too easy" for him, while also being able to finish three classes in that term, several months after the accident.<sup>9</sup> In fact, Plaintiff stated that he made the Dean's List in the Spring 2012 term and finished at least one class in the Fall 2012 term as well.<sup>10</sup> This Court queries: if Plaintiff was suffering from such serious or severe pain as he has claimed and only went to see his primary care physician, participated in several unsuccessful therapy sessions, and engaged in self-medication to reduce pain, along with "mind-busying" showers, why did he not seek further treatment to address these symptoms over the time since the accident?

In reviewing the relevant case law, the impairment of Plaintiff's injuries to his body function is analogous to that

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<sup>7</sup> Strockyj Dep. 35:19 - 37:7; 42:9 - 42:17, February 25, 2015.

<sup>8</sup> Strockyj Dep. 46:20 - 48:3, February 25, 2015.

<sup>9</sup> Strockyj Dep. 72:6 - 73:17, February 25, 2015.

<sup>10</sup> Strockyj Dep. 73:18 - 74:14, February 25, 2015.



of the plaintiff in *McGee v. Muldowney*. 750 A.2d 912 (Pa. Super. Ct. 2000). The plaintiff in *McGee* was also in a motor vehicle accident and was immediately treated at a hospital emergency room. Further, the plaintiff in *McGee* did not seek medical attention until more than a week later, complaining of pain in the back, neck, and shoulders, and all subsequent scans and examinations were "unremarkable." *Id.* at 914. Additionally, the plaintiff in *McGee* was able to return to his daily activities with minimal limitations. The Superior Court held that the appellant had "failed to present any objective medical evidence as to the degree of any impairment and extent of any pain suffered during the last five years . . . the subjective allegations presented by appellant, in the absence of objective medical evidence, do not permit a finding that appellant has suffered the requisite 'serious injury'." *Id.* at 915.

Plaintiff claims these headaches are "much different" than the ones he suffered prior to the accident.<sup>11</sup> He further claims that these headaches affect his ability to sleep at night. However, Plaintiff has not offered any medical testimony to corroborate his claims, nor expert reports to support his contention. All the record on this matter contains is a number of reports from doctor's visits to Dr. Ruth Frye, Plaintiff's

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<sup>11</sup> Strockyj Dep. 42:22, February 25, 2015.

general practitioner, as well as other doctors, stating that he was complaining of headaches, back pain, and/or that he was having difficulty sleeping. These reports are dated both before and after the date of the accident.

Plaintiff cites to *Robinson v. Upole* as an example of a case where a plaintiff suffered a serious injury and argues this case is similar to that one. 750 A.2d 339 (Pa. Super. Ct. 2000). Plaintiff points out that in that case, Robinson suffered from chronic pain syndrome, fibromyalgia, and sleep impairment, which affected daily body functions. Plaintiff contends that many of the same symptoms are present in this case. However, in that case, Robinson had testimony from a medical expert to corroborate his claims, and the defendant was allowed to question him during a deposition. *Id.* at 341. As stated above, "[g]enerally, medical testimony will be needed to establish the existence, extent, and permanency of the impairment." *Hellings v. Bowman*, 744 A.2d 274, 276 (Pa. Super. Ct. 1999). While in the *Robinson* case, the Superior Court found that the trial court had erred in granting the defendant's motion for summary judgment, here, there has been no medical testimony or evidence presented to the Court that Plaintiff's injuries are of a permanent nature or will substantially impair his daily activities in the future. See *Calderon v. Kauffman*, 3 Pa. D. & C. 5<sup>th</sup> 225, 227 (Pa. Com. Pl. Aug. 7, 2007) (Due to

plaintiff's inability to produce any medical documentation that her injuries from an accident substantially interfered with normal activities, the Court granted defendant's motion for summary judgment).

To survive a motion for summary judgment, the non-moving party cannot rest upon the pleadings and bald assertions, but rather must provide support in the form of affidavits to overcome the moving party having met its burden. Pa.R.C.P. 1035(3)(a). Here, Plaintiff has not provided the Court with any evidence to contradict that presented by the Defendants nor have they raised a genuine issue of material fact that Plaintiff's injury was a "serious" one.

For the reasons stated above and after careful consideration of all the admissible evidence in the light most favorable to the Plaintiff, this Court finds that Defendants have met their burden in proving Strockyj has not suffered serious injury in order to recover noneconomic loss from the accident of September 27, 2011. Accordingly, the Court enters the following order:

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vs.	:	No. 13-1985
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DONNA M. NOTHSTEIN	:	
	:	
Defendants	:	

John J. Zettlemoyer, Jr., Esquire	Counsel for Plaintiff
Michael P. Shay, Esquire	Counsel for Defendants

**ORDER OF COURT**

AND NOW, this       day of December, 2015, upon consideration of the Motion for Partial Summary Judgment filed by Defendants, Wayne and Donna Nothstein, the briefs lodged in support thereof, Plaintiff's response and supplemental brief thereto, and after oral argument thereon, it is hereby

ORDERED and DECREED that the Motion for Partial Summary Judgment is **GRANTED** and Plaintiff is precluded at time of trial from recovering noneconomic damages.

BY THE COURT:

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Joseph J. Matika, Judge