

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IAS PART 14  
Justice

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ISHWAR CHAND,		
	Plaintiff,	Motion
		Date October 26, 2004
	-against-	
		Motion
MOHAMMAD ASGHAR,		Cal. No. 9
	Defendant.	
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The following papers numbered 1 to 7 read on this motion by defendant for summary judgment dismissing plaintiff's complaint due to plaintiff's failure to sustain a serious injury pursuant to Insurance Law § 5102(d).

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Answering Affidavits.....	5-7

Upon the foregoing papers it is ordered that this motion is disposed of as follows:

For the past several years there have been many decisions, both at the trial and appellate levels, attempting to interpret the definition of "serious injury" as set forth in Insurance Law § 5102(d). Other than the obvious serious injuries, i.e., death or dismemberment, the decisions have been confusing, unsettling and complex. The issue has narrowed down to soft tissue injuries and the conflicting medical affirmations submitted in support as well as in opposition to motions for summary judgment pursuant to CPLR 3211 and 3212, to dismiss plaintiff(s)' complaint. The opposing parties, in our adversarial system of justice are, in effect, asking this court, to determine within its finite wisdom, the credibility of the medical experts, as a matter of law.

Initially defendant(s) submits medical affirmations which clearly, definitively and without any doubt or hesitation, after the usual cursory 15 minute physical examination of plaintiff(s), affirm under penalty of perjury, that plaintiff(s) has not

sustained a serious injury. This IME, Independent Medical Examination, is neither independent nor truly a medical examination. Are we to obscure the truth and accept the fiction that the examining doctor, retained by the defendant(s) to conduct a physical examination, being paid by the defendant(s) for his or her examination and report, and to be further paid, in futuro, for his testimony at a trial of the action, is independent? Nothing can be further than the truth. Nor does this scenario absolve the plaintiff(s)' attorney(s) from the same fiction that plaintiff(s)' expert is totally free of any prejudice. Any doctor, not adhering to the unwritten code of either finding a "serious injury" or denying the existence of same, will no longer have that annuity income generated by his or her interpretation of the x-ray films, MRI films, CT scans, EEG's, EMG's, etc., etc., etc. The statute and case law have created a battle of experts and this court, cannot, as a matter of law, determine the credibility of the medical professionals based upon their affirmations.

It is therefore, this court's considered opinion, that in other than the obvious serious injuries, the motions for summary judgment should be denied. The experts will then testify during the trial, be subjected to the usual vigorous cross examination of opposing counsel and let the jury decide, as a question of fact, which of the experts it believes presents a more credible picture of a plaintiff's injury and whether or not it is "serious injury".

Inasmuch as the medical affirmations submitted herein create a triable issue of fact on the question of whether plaintiff sustained a serious injury, defendant's motion is denied.

Dated: January 18, 2005

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**Thomas V. Polizzi, J.S.C.**