

**Victory v Allen**

2007 NY Slip Op 30409(U)

March 29, 2007

Supreme Court, Onondaga County

Docket Number: 0007160

Judge: Donald A. Greenwood

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**At a Motion Term of the Supreme  
Court of the State of New York,  
held in and for the County of  
Onondaga on March 27, 2007.**

**PRESENT: HON. DONALD A. GREENWOOD  
Supreme Court Justice**

**STATE OF NEW YORK  
SUPREME COURT COUNTY OF ONONDAGA**

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**DEBORAH VICTORY, Individually and as Parent and  
Natural Guardian of JOSEPH KALINA, an infant under  
the age of 18 years,**

**Plaintiffs,**

**v.**

**GARY ALLEN,**

**Defendant.**

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**DECISION AND ORDER  
ON MOTION**

**Index No.: 2002-7160  
RJI No.: 33-03-4163**

**APPEARANCES: DAVID C. ROLLINSON, ESQ.  
THE ROLLINSON LAW FIRM  
For Plaintiffs**

**STEPHEN S. DAVIE, ESQ.  
MACKENZIE HUGHES, LLP  
For Defendant**

The defendant has moved for bifurcation of the liability and damages phases of the trial in this matter which concerns personal injuries suffered by the infant plaintiff, Joseph Kalina, while riding a scooter, when he was struck by a vehicle driven by the defendant. The plaintiffs allege that Joseph suffered numerous injuries as a result of the incident, including skull fractures, a traumatic brain injury, hip, pelvis, left knee and ankle injuries, as well as loss of cognitive functions and mental reasoning ability, social, emotional, psychiatric and behavior problems. In

moving for a bifurcation, the defendant argues that there is a strong question of liability which is wholly distinct from the damages portion of the case, with the issues relevant to the defendant's alleged negligence, such as the manner in which the defendant operated his vehicle and kept a proper look-out, being separate and distinct from the nature of the plaintiff's injuries.

The law is well settled that judges are encouraged to order a bifurcated trial of the issues of liability and damages in a personal injury action where it appears that the bifurcation will assist in the clarification or simplification of issues in a fair or more expeditious resolution of the action. *See, 22 NYCRR §202.33*. Bifurcation is appropriate where there is a showing that the plaintiff's injuries do not have an important bearing on the issue of liability and where the injuries are not inextricably intertwined with the question of liability. *See, Ellis v. J&G, Inc.*, 31 AD3d 1220 (4<sup>th</sup> Dept. 2006); *see also, Barron v. Terry*, 268 AD2d 760 (3d Dept. 2000). The decision of whether or not to bifurcate a trial rests within the sound discretion of the court. *See, Barron, supra*.

In opposing the motion, the plaintiff contends, *inter alia*, that the nature and extent of his injuries are inextricably intertwined with the question of defendant's liability. It is undisputed that there were no eyewitnesses to this accident,<sup>1</sup> other than the defendant, who contends that he was traveling within the posted speed limit of 30 miles per hour when his vehicle struck the plaintiff, who turned his scooter in the path of the defendant's vehicle without warning. The Fourth Department has held that although issues of liability and damages in negligence trials generally should be tried separately, an exception to that rule arises where plaintiff demonstrates evidence concerning the nature and extent of his injuries will enable the jury to consider and evaluate the force of the impact and arrive at an approximation of the rate of speed of the

defendant's vehicle. *See, Tate v. Stevens*, 275 AD2d 1039 (4<sup>th</sup> Dept. 2000). In the present case, the plaintiff offers the affidavit of Eugene Camerota, a professional engineer, who completed a reconstruction of the subject accident and determined that the defendant did not travel within the speed limit and instead was driving at 43 to 48 miles per hour at the time of the impact. This opinion is predicated upon a review of photographs at the scene, the police accident report, deposition testimony of the parties, an inspection of the accident scene and review of plaintiffs' bill of particulars. Camerota factored into his analysis that plaintiff was eleven years old at the time, that he was struck in the left hip, that defendant's vehicle struck the plaintiff and plaintiff hit the right side of his head on the windshield and was subsequently thrown 20 to 30 feet after the defendant's vehicle was stopped. He specifically notes that "where the plaintiff was first hit on his body is important to reconstruct the accident; where the head hit the windshield is indicative of speed and the distance the plaintiff was carried/thrown is also an element with regard to determining speed of the vehicle". *Camerota Affidavit*, p. 3. Camerota opines that only these particular facts concerning the contact of plaintiff's body with the vehicle are necessary foundation for his testimony at trial. Significantly absent from the Camerota affidavit is any indication that the specific injuries suffered by the plaintiff are relevant to determine the speed of the vehicle or that Camerota as an engineer is qualified to testify with respect to those medical issues. As such, the plaintiff has demonstrated only that evidence concerning the portions of the plaintiff's body which were struck are relevant during the liability phase. Therefore, the plaintiffs have failed to show that injuries themselves are inextricably intertwined with the question of liability to require an exception to the general rule encouraging bifurcation. *See, Ellis, supra; see also, Tate, supra*. The defendant's motion for bifurcation is granted and the plaintiffs' proof during the liability phase with respect to the plaintiff's injuries is limited only to

the portions on the plaintiff's body which made contact with the defendant's vehicle.

The plaintiffs make requests with respect to potential jury charges in this motion as well.

Those requests are premature and can be made at the time of trial.

**NOW**, therefore, for the foregoing reasons, it is

**ORDERED**, that the defendant's motion for bifurcation of the liability and damages phases of the trial is granted.

**ENTER**

**Dated: March 29, 2007**  
**Syracuse, New York**

**DONALD A. GREENWOOD**  
**Supreme Court Justice**

<sup>1</sup> The plaintiffs have offered medical affidavits showing that he suffered from amnesia as a result of the accident.