SHORT FORM ORDER

INDEX No. 03-20894
CAL. No. 06-01501-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/24/06
ADJ. DATE 1/17/07
Mot. Seq. # 004 - MD

ANN-MARIE PIERCE and THOMAS PIERCE, Plaintiffs, - against - BRUCE RUPP, AVTANDIL RUKHADZE and TIMUR SYUNYAKOV, Defendants.	CARTIER BERNSTEIN AUERBACH & DAZZO Attorneys for Plaintiffs 77 Medford Avenue, P.O. Box 919 Patchogue, New York 11772 MONTFORT HEALY McGUIRE & SALLEY Attorneys for Deft Rupp 1140 Franklin Avenue, P.O. Box 7677 Garden City, New York 11530-7677 AVTANDIL RUKHADZE, *Pro Se* 607 Lincoln Avenue Staten Island, New York 10306 TIMUR SYUNYAKOV, *Pro Se* 1810 Cortelyou Road, Apt. 4B Brooklyn, New York 11226

Upon the following papers numbered 1 to 54 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 36; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 37 - 52; Replying Affidavits and supporting papers 53 - 54; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Bruce Rupp for summary judgment dismissing the complaint and all cross claims against him on the ground that plaintiffs have failed to prove that he was negligent, or, in the alternative, that plaintiffs have not sustained a serious injury as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs when their vehicle was rear-ended by a vehicle owned and operated by defendant Bruce Rupp. The following facts are undisputed. The accident occurred on the eastbound lanes of the Belt Parkway in Queens County, New York on the afternoon of October 14, 2002. There were four vehicles involved in the

accident. The lead vehicle which was operated by defendant Timur Syunyakov and owned by defendant Avtandil Rudhadze collided with an unidentified vehicle which subsequently left the scene; behind it was the vehicle owned by plaintiff Ann-Marie Pierce and operated by plaintiff Thomas Pierce; last in line was the vehicle owned and operated by defendant Rupp. At the time of the accident, plaintiff Ann-Marie Pierce was a front-seat passenger in the plaintiffs' vehicle.

Defendant Rupp now moves for summary judgment in his favor dismissing the complaint and all cross claims against him on the ground that plaintiffs have failed to prove that he was negligent, or, in the alternative, that plaintiffs have not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant Rupp submits, *inter alia*, the pleadings; a bill of particulars; the deposition testimony given by himself, plaintiff Thomas Pierce and plaintiff Ann-Marie Pierce; the affirmed report dated May 18, 2005 of no-fault carrier's orthopedist, Dr. Richard Linwood, based on an examination of plaintiff Ann-Marie Pierce on the same date; the affirmed report dated September 28, 2005 of no-fault carrier's neurologist, Dr. Charles Bagley, based on an examination of plaintiff Ann-Marie Pierce on the same date; the affirmed MRI report of plaintiff Ann-Marie Pierce's cervical spine, taken on January 15, 2003 by Dr. Sondra Pfeffer; the affirmed report dated March 10, 2003 of plaintiffs' treating neurologist, Dr. Stephen Newman, based on an examination of plaintiff Ann-Marie Pierce on the same date; the affirmed report dated May 18, 2005 of Dr. Richard Linwood, based on an examination of plaintiff Thomas Pierce on the same date; the affirmed report dated September 28, 2005 of Dr. Charles Bagley, based on an examination of plaintiff Thomas Pierce on the same date; three affirmed MRI reports dated July 19, 2004 of Dr. Gerald Schulze concerning plaintiff Thomas Pierce's cervical spine, left shoulder and left knee, taken on October 28, 2002, November 5, 2002 and November 1, 2002 respectively; the affirmed report dated October 28, 2002 of plaintiffs' treating orthopedist, Dr. Anjani Sinha, based on an examination of plaintiff Thomas Pierce on the same date; the MRI report of plaintiff Thomas Pierce's left knee, taken on November 1, 2002 by Dr. Robert Solomon; the medical report dated December 9, 2002 of Dr. Anjani Sinha, based on an examination of plaintiff Thomas Pierce on the same date; the medical report dated August 26, 2003 of plaintiffs' treating neurologist, Dr. Frederic Mendelsohn, based on an examination of plaintiff Thomas Pierce; and the medical report dated July 30, 1999 of plaintiffs' treating physician, Dr. Richard Hindes, based on an examination of plaintiff Thomas Pierce on the same date.

At his examination before trial, plaintiff Thomas Pierce testified to the effect that, while he was traveling eastbound in the left lane of the Belt Parkway, he "saw an [unidentified] vehicle in the center lane veer [into] the left lane, causing the car in front of [him] to apply [its] brakes." The vehicle in front of plaintiff Thomas Pierce was a "red" Oldsmobile and was traveling in the left lane. The color of the unidentified vehicle in the center lane was "possibly white." Plaintiff Thomas Pierce testified that, immediately after he saw the Oldsmobile apply its brakes, he applied his brakes but "didn't pump them." Rather, he "just gave a firm application" to slow down. Plaintiff Thomas Pierce also testified that, although he "heard the Oldsmobile skid," he did not see those two vehicles hit each other. He also did not remember whether he heard "any noises, like contact between vehicles." Because the Oldsmobile came to a "fairly" sudden stop, he "veered towards the left to avoid the [Oldsmobile]" and came to a complete stop in a "smooth [and] controlled" manner between a center median barrier and the Oldsmobile. The front of his vehicle was parallel with the front left fender of the Oldsmobile and there were "[o]ne or two feet" of space between two vehicles. There was no contact between two vehicles.

Plaintiff Thomas Pierce further testified that, while he was at the complete stop, he heard the sounds of screeching tires and his vehicle and the Oldsmobile were hit from behind by the Rupp vehicle at the same time. He was involved in only one impact.

At her deposition, plaintiff Ann-Marie Pierce testified to the effect that, while the plaintiffs' vehicle was traveling eastbound on the Belt Parkway, she was sleeping. When she "felt the brakes, the car stopping suddenly," she woke up and saw the collision between the vehicle in front of her in the left lane and a vehicle from the center lane. Immediately after the plaintiffs' vehicle came to a complete stop, she felt a hard impact from the rear of her vehicle. She positively identified the color of the vehicles involved in the accident. One was red and the other was white, except for the Rupp vehicle.

At his deposition, defendant Rupp testified to the effect that, while he was traveling eastbound in the left lane of the Belt Parkway at the speed of 50 miles per hour, he observed the collision between two vehicles. One was a red vehicle and the other was a white one. Prior to the collision, the white vehicle was located in the left lane, while the red vehicle was located in the middle lane. The plaintiffs' vehicle was traveling in the left lane behind the white vehicle. He "observed the white car [in the left lane] cut across the middle lane." The front side of the red vehicle came into contact with the rear bumper of the white vehicle. Following the collision, the red vehicle came to stop in the middle lane, while the white vehicle "hit the center divider and fled the scene." Immediately after the collision, he saw the brake lights of the plaintiffs' vehicle in the split-second period, and the vehicle came to a stop. When the plaintiffs' vehicle came to a stop, it was in the left hand lane "partially toward the middle lane." Defendant Rupp applied his brakes with full force, but his vehicle went into a skid and struck the rear passenger side of the plaintiffs' vehicle. Then, the Rupp vehicle moved toward the middle lane and also hit the rear driver side of the red vehicle. Defendant Rupp testified that he was involved in only one impact with the plaintiffs' vehicle.

It is well settled that a prima facie case of liability is created when the operator of the moving vehicle rear-ends a stopped vehicle and that a duty of explanation is imposed on the operator of the moving vehicle to excuse the collision by providing a non negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement or some other reasonable cause (*see, **Rainford v Han***, 18 AD3d 638, 795 NYS2d 645 [2005]; ***Thoman v Rivera,*** 16 AD3d 667, 792 NYS2d 558 [2005]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the driver of the lead vehicle may properly be awarded judgment as a matter of law (***Russ v Investech Sec.***, 6 AD3d 602, 775 NYS2d 867 [2004]; ***Reid v Courtesy Bus Co.***, 234 AD2d 531, 651 NYS2d 612 [1996]). It is also well settled that a driver of a motor vehicle who is approaching another motor vehicle from the rear is bound to maintain a safe rate of speed and has a duty to keep control over his vehicle, as well as to exercise reasonable care to avoid colliding with the other vehicle (***Chapel v Meyer,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** *supra*; *see also*, Vehicle and Traffic Law §1129 [a]).

Here, the deposition testimony of plaintiffs and defendant Rupp conflicted with each other as to the happening of the accident. Moreover, there are several issues of fact as to which vehicle was located in the left lane; which vehicle caused the first collision; and whether the plaintiffs' vehicle came to a

sudden stop. Under these circumstances, there is a question of fact as to whether the action of defendant Rupp contributed to any injuries sustained by plaintiffs (***Viggiano v Camara***, 250 AD2d 836, 673 NYS2d 714 [1998]). Thus, defendant Rupp has failed to sustain the initial burden of establishing a prima facie entitlement to judgment as a matter of law. Accordingly, this branch of the motion by defendant Rupp for summary judgment on the issue of liability is denied.

Defendant Rupp also seek summary judgment on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

By their bill of particulars, plaintiffs allege that, as a result of the subject accident, plaintiff Ann-Marie Pierce sustained serious injuries including herniated discs at C5-C6 and C6-C7; wrist neuropathy; foraminal stenosis at L5-S1; canal stenosis at L4-L5; and tenderness in the low back. Plaintiff Thomas Pierce also allegedly sustained serious injuries including ACL tear of the left knee; intrameniscal signal in the posterior horn of the medial meniscus of the left knee; herniated discs at C3-C4, C4-C5, C5-C6 and C6-C7; myofascial trigger area at C5-C6; cervical radiculopathy; tenderness at C7; straightening of cervical lordosis; tenderness in the left shoulder; and cuff tendonitis and/or intrasubstance cuff tear of the left shoulder. In addition, plaintiffs claim that, following the subject accident, plaintiffs Ann-Marie Pierce and Thomas Pierce were confined to bed and home for approximately three days and two days, respectively

Insurance Law §5102(d) defines "serious injury" 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once

defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [1990]).

Here, defendant Rupp failed to make a prima facie showing that plaintiff Ann-Marie Pierce did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2005]). Dr. Pfeffer's MRI report of plaintiff Ann-Marie Pierce's cervical spine, taken on January 15, 2003, revealed that she had herniated discs at C5-C6 and C6-C7 and a bulging disc at C4-C5. For a herniated or bulging disc to constitute a serious injury, there must be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see*, ***Guzman v Paul Michael Mgt.***, 266 AD2d 508, 698 NYS2d 719 [1999]). On March 10, 2003, approximately five months after the subject accident, Dr. Newman examined plaintiff, using certain neurologic tests and found that plaintiff Ann-Marie Pierce suffered from cervical and lumbar spasm. Dr. Newman failed to specifically quantify the range of motion restriction in plaintiff Ann-Marie Pierce's cervical and lumbar spine (*see*, ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2006]). He also failed to set forth the objective tests that were performed to support his conclusion that plaintiff Ann-Marie Pierce "has no abnormalities on her neurologic examination" (*see*, ***Vazquez v Basso***, 27 AD3d 728, 815 NYS2d 626 [2006]; ***Nembhard v Delatorre***, *supra*). On May 18, 2005, approximately two years and seven months after the subject accident, Dr. Linwood examined plaintiff Ann-Marie Pierce, using certain orthopedic and neurological tests including Adson test, Straight Leg Raising test, Phalen test and Tinel test. All the test results were negative. Dr. Linwood reported his findings with respect to the various ranges of motion of plaintiff Ann-Marie Pierce's cervical and lumbar spines. Nevertheless, Dr. Linwood failed to compare his findings with a normal range of motion (*see*, ***Baudillo v Pam Car & Truck Rental***, 23 AD3d 420, 803 NYS2d 922 [2005]; ***Aronov v Leybovich***, 3 AD3d 511, 770 NYS2d 741 [2004]). On September 28, 2005, approximately two years and eleven months after the subject accident, Dr. Bagley examined plaintiff Ann-Marie Pierce, using certain orthopedic and neurological tests and allegedly found that plaintiff Ann-Marie Pierce had normal range of motion in flexion, extension and lateral flexion of her cervical spine, although there was "some restrictions in right lateral flexion and mild tenderness over the left mid cervical transverse processes." Nevertheless, Dr. Bagley failed to set forth the objective tests that were performed to support his conclusion that plaintiff Ann-Marie Pierce did not suffer from any limitation of the range of motion, except for right lateral flexion (*see*, ***Vazquez v Basso***, *supra*; ***Kennedy v Brown***, 23 AD3d 625, 805 NYS2d 408 [2005]). Moreover, he also failed to specifically quantify the range of motion restriction in plaintiff Ann-Marie Pierce's lumbar spine (*see*, ***Browdame v Candura***, *supra*).

Defendant Rupp also failed to make a prima facie showing that plaintiff Thomas Pierce did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Dr. Schulze's MRI report of plaintiff Thomas Pierce's cervical spine, left shoulder and left knee, taken on October 28, 2002, November 5, 2002 and November 1, 2002 respectively, revealed that he had preexisting degenerative disc disease and cervical spondylosis at C5-C6 and C6-C7, preexisting supraspinatus tendonitis secondary to impingement syndrome and partially preexisting left knee pathology such as anterior cruciate ligament tear, lateral meniscar tears, diffuse degenerative joint disease and chondromalacia

patella. Dr. Solomon's MRI report of plaintiff Thomas Pierce's left knee, taken November 1, 2002, revealed that he had ACL tear, intrameniscal signal in the posterior horn of the medial meniscus and Grade I MCL and LCL sprain. On October 28, 2002, Dr. Sinha administered certain orthopedic tests to plaintiff Thomas Pierce and found that, although he had tenderness at C7, he had normal range of motion in flexion, extension and rotation of his cervical spine without supporting objective tests. Dr. Sinha stated in the report that plaintiff Thomas Pierce has a "torn medial meniscus of the left knee, a torn rotator cuff of the left shoulder and cervical strain" and his injury to neck, left shoulder and left knee "could be related to the [subject] accident." While a diagnosis of a bulging or herniated disc, by itself, does not constitute a serious injury (*see*, ***Guzman v Paul Michael Mgt.***, 266 AD2d 508, 698 NYS2d 719 [1999]), a diagnosis of a meniscus tear creates an issue of fact as to whether the injured plaintiff suffered a serious injury (*see*, ***Papadonikolakis v First Fid. Leasing Group***, 283 AD2d 470, 724 NYS2d 635 [2001]; ***Goldberg v Marengo***, 2006 NY Slip Op 52375U, 2006 NY Misc Lexis 3734 [2006]; ***Michel v Graham***, 2003 NY Slip Op 51170U, 2003 NY Misc Lexis 1036 [2003]). In his report dated August 26, 2003, Dr. Mendelsohn stated that he examined plaintiff Thomas Pierce, using certain neurological tests and found that all the test results were normal. Dr. Mendelsohn did not discuss initial or subsequent loss of range of motion in plaintiff Thomas Pierce's cervical spine, left knee and left shoulder. On May 18, 2005, approximately two years and seven months after the subject accident, Dr. Linwood examined plaintiff Thomas Pierce and found that "he lacks approximately 6 degrees of extension and about 5-8 degrees of flexion"; he has an "excellent range of motion" in his cervical spine; and "there was no muscle spasm." Nevertheless, Dr. Linwood failed to specifically quantify the range of motion restriction in plaintiff Thomas Pierce's cervical spine (*see*, ***Browdame v Candura***, *supra*). On September 28, 2005, approximately two years and eleven months after the subject accident, Dr. Bagley examined plaintiff Thomas Pierce, using certain orthopedic and neurological tests and allegedly found that plaintiff Thomas Pierce had normal range of motion in flexion and extension of her cervical spine, although there was "minimal right lateral restrictions." Nevertheless, Dr. Bagley failed to set forth the objective tests that were performed to support his conclusion that plaintiff Thomas Pierce did not suffer from any limitation of the range of motion, except for right lateral flexion (*see*, ***Vazquez v Basso***, *supra*; ***Kennedy v Brown***, *supra*). Moreover, he also failed to specifically quantify the range of motion restriction in plaintiff Thomas Pierce's cervical spine (*see*, ***Browdame v Candura***, *supra*).

Thus, defendant Rupp failed to establish, prima facie, his entitlement to judgment as a matter of law (*see*, ***Goldman v Frankel***, 5 AD3d 729, 773 NYS2d 602 [2004]; ***Michel v Graham***, *supra*). Accordingly, this branch of the motion by defendant Rupp for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiffs' opposition papers (*see*, ***Barrett v Jeannot***, 18 AD3d 679, 795 NYS2d 727 [2005]).

Dated: MAR 2 6 2007

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**