

<b>Poulos-Guldi v Wright</b>
2007 NY Slip Op 30816(U)
April 10, 2007
Supreme Court, Suffolk County
Docket Number: 0020127/2004
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 11-1-06  
ADJ. DATE 1-10-07  
Mot. Seq. # 001- MG; CASEDISP  
002- XMD

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CATHERINE POULOS-GULDI,	:		:	JEAN MARIE HAZELTON, P.C.
	:		:	Attorney for Plaintiff
Plaintiff,	:		:	P.O. Box 5041
	:		:	Southampton, New York 11969
- against -	:		:	
	:		:	ABAMONT & ASSOCIATES
KYLE E. WRIGHT, LEE M. WRIGHT and	:		:	Attorneys for Defendants
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Defendants.	:		:	Garden City, New York 11530-9250
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Upon the following papers numbered 1 to 32 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11-26; Answering Affidavits and supporting papers 27 - 29; Replying Affidavits and supporting papers 30 - 32; Other \_\_\_\_\_: (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted and the complaint is dismissed; and it is further

**ORDERED** that plaintiff's cross motion for, inter alia, summary judgment on liability grounds is denied as untimely and academic.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on Route 39 at or near its intersection with Tuckahoe Lane, Southampton, New York on September 1, 2002. The accident allegedly happened when the vehicle owned/registered by defendants George E. Wright and Lee M. Wright and operated by defendant Kyle E. Wright made a sudden left turn on Route 39 in front of the vehicle operated by the plaintiff, which in turn caused plaintiff's car to impact the passenger side of defendants' vehicle. Defendants now move for summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff cross-moves for, inter alia, summary judgment in her favor on liability grounds. Opposition and reply papers have also been filed.

Inasmuch as the note of issue in this action was filed on August 11, 2006, any motion for summary judgment made after December 9, 2006 would have been untimely. The affidavit of service attached to plaintiff's cross motion papers establishes that the cross motion was made on December 23, 2006, and is thus, untimely (CPLR 3212 [a]). Furthermore, plaintiff has not demonstrated good cause for the delay, and the court may not deem that good cause exists (*see, Miceli v State Farm Mut. Auto. Insur. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Rivers v City of New York*, 2007 NY Slip Op. 1716 [2d Dept 2007]; *Bressingham v Jam. Hosp. Med Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]). However, plaintiff's claim that she sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) has been treated as opposition to defendants' timely motion.

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 Inc.*, 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 Systems, Inc.*, 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 [2d Dept 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 [1<sup>st</sup> Dept 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 Eycler*, 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 [2d Dept 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 [3d Dept 1990]).

In support of this motion, defendants submit, among other things, the pleadings; plaintiff's verified bill of particulars; the affirmed report of defendants' examining neurologist, Mathew M. Chacko, M.D.; and the affirmed report of defendants' examining orthopedist, Frank D. Oliveto, M.D. Plaintiff claims in her bill of particulars that she sustained bilateral carpal tunnel syndrome; median nerve root entrapment at the wrist (unspecified); cervical spine radiculopathy on the right; cervical spine disc bulges and herniations; a cervical sprain; and an aggravation of her preexisting neck condition. Plaintiff, however, claims that she was not

confined to her bed or incapacitated from her employment. In connection with her alleged injuries, plaintiff claims a serious injury in the categories of a permanent loss of use; a permanent consequential limitation; a significant limitation; and a non-permanent injury.

In his report dated June 13, 2006, Dr. Chacko states that he performed an independent neurological examination of the plaintiff on that date, and his findings include a normal active range of motion of the neck; a normal sensory exam; a normal gait; normal tone and strength in the upper and lower extremities; DTRs that were “2-” and symmetrical; no atrophy or fasciculations; and no palpable muscle spasm in the cervical or thoracic areas. Dr. Chacko noted that plaintiff had sustained a compression fracture to the thoracic spine in 1989, but that she had no complaints relative to the thoracic or lumbar areas as it relates to the accident of September 1, 2002. Dr. Chacko opined that there were no clinical findings consistent with carpal tunnel syndrome, peripheral neuropathy or nerve entrapment. Additionally, Dr. Chacko concluded that plaintiff had sustained a cervical strain which had resolved and that she was not disabled.

In his report dated June 28, 2006, Dr. Oliveto states that he performed an independent orthopedic examination of the plaintiff on that date and his findings include equal and symmetrical reflexes; no atrophy of the upper or lower extremities; no neurovascular deficits of either upper extremity; and a negative Tinel’s sign/Phalen’s test at the wrists and hands bilaterally. He also observed that there was full range of motion of the cervical spine with no tenderness or spasm. In addition, he noted that plaintiff had a pre-existing cervical spine injury in 1999. Dr. Oliveto opined that plaintiff had sustained an aggravation of a pre-existing cervical strain syndrome which had objectively resolved. Moreover, he concluded that plaintiff was able to resume her normal activities with no restrictions.

Plaintiff testified that she declined an ambulance after the accident. Later that evening, she drove herself to the hospital and was released the same day. She did not miss any time from work after the accident. As a result of her injuries, he is unable to lift heavy objects or exercise properly. Plaintiff further testified that she drove herself to Tennessee and South Dakota during a cross-country vacation which she took with her children after the accident.

By their submissions, defendants made a prima facie showing that plaintiff did not sustain a serious injury (*see, Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Teodoru v Conway Transp. Svc.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Willis v New York City Trans. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]; *Grant v Heli Trucker, Inc.*, 294 AD2d 538, 742 NYS2d 874 [2d Dept 2002]). Defendants’ examining orthopedist found that plaintiff had a full range of motion of the cervical spine with no detectable spasm. Defendants’ examining neurologist found that plaintiff had normal tone and strength in the upper and lower extremities, as well as a normal sensory system. Further, defendants’ examining orthopedist and neurologist each opined that plaintiff’s injuries had resolved and that she was not disabled. The defendants’ remaining evidence, including plaintiff’s deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants met their burden as to all categories of serious injury alleged by the plaintiff, the Court turns to plaintiff’s proffer (*see, Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion, plaintiff submits, inter alia, the unsworn report of plaintiff’s treating radiologist, Robert Diamond, M.D.; the affirmed report of plaintiff’s treating physiatrist, Barry Rubin, M.D.; the personal affirmation of plaintiff’s treating orthopedist, Craig B. Ordway, M.D.; the personal affidavit of

plaintiff's treating chiropractor, Brian M. Barrett, D.C.; and the plaintiff's personal affidavit. Initially, the unsworn report of Dr. Diamond, that was discussed in detail by defendants' examining orthopedist, is admissible and has been considered.

In his report dated November 1, 2002, Dr. Diamond states that he performed MRI studies of the plaintiff's cervical spine on that date, and his findings include disk bulges at C3-4/C4-5, as well as disk herniations at C5-7/C6-7. He also noted, however, that there were no focal prevertebral or posterior paraspinal abnormal masses and no significant protrusions into the neural canal, recesses or foramina.

In his report dated November 26, 2003, Dr. Rubin states that he performed a medical examination of the plaintiff on that date, and his findings include intact cranial nerves; no muscle atrophy; reflexes that were "2+" and symmetrical throughout; a negative cervical compression test; and a negative Tinel's sign at the wrists bilaterally. He also observed that there was mild to moderate spasm in the trapezii with tenderness bilaterally. Dr. Rubin noted that plaintiff missed one day from work and opined that she could continue her job duties without restriction.

In his personal affirmation, Dr. Ordway avers that he performed an initial orthopedic examination of the plaintiff on July 16, 2003, and his findings include positive bilateral foraminal closure tests with radiation down the posterior aspect of both forearms as well as marked spasm of the paravertebral musculature and anterior strap muscles. During her next visit on August 30, 2004, he noted that the foraminal closure was markedly positive and that plaintiff continued to complain of pain on the left side of her neck and numbness in the hands. During her next and last visit on November 29, 2006, his testing showed deficits in plaintiff's cervical range of motion with complaints of pain and numbness in her hands. Dr. Ordway opined that plaintiff sustained a causally related injury to her cervical spine that has resulted in a permanent, moderate, partial degree of impairment for the use of the cervical spine.

In his personal affidavit, Dr. Barrett avers that he performed an initial chiropractic examination of the plaintiff on September 13, 2002, and his findings include various limitations in her cervical spine ranges of motion. He treated the plaintiff with a range of chiropractic modalities two to three times per week for a total of about 35 visits until December 2002. Dr. Barrett also avers that plaintiff then treated with him on an as needed basis. He next examined the plaintiff on November 16, 2006, and his findings include limitations in plaintiff's cervical spine ranges of motion with complaints of neck pain and stiffness as well as headaches. Additionally, he noted that plaintiff complained of her inability to lift heavy boxes due to neck pain. Dr. Barrett opines that plaintiff sustained a permanent, significant limitation to her cervical spine.

In her personal affidavit, plaintiff avers that she received chiropractic treatment, physical therapy, and acupuncture that provided temporary relief of her symptoms. She restricted her activities at work to light duty as she can no longer lift or carry heavy boxes. In addition, plaintiff avers that she has limited her exercise activities and that she is no longer able to engage in home improvement projects. Plaintiff further avers that she only has one kidney and is restricted from the regular use of pain medication and anti-inflammatories.

Plaintiff has provided insufficient medical proof to raise an issue of fact that she sustained a serious injury under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). While a disc herniation may constitute a serious injury, the cervical MRI report by Dr. Diamond is not probative for

the purposes of demonstrating a serious injury because it contains no opinion as to causation (*see, Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and, in any event, does not establish the duration of plaintiff's alleged injuries (*see, Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Nelson v Amicizia*, 21 AD3d 1015, 803 NYS2d 87 [2d Dept 2005]). Also, the report of Dr. Rubin, which references an examination performed about three years prior to the filing of defendants' motion, is without probative value as to the categories of a permanent partial limitation or a significant limitation (*see, Legendre v Bao*, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2006]; *McKinney v Lane*, 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001]). Additionally, the affirmation of Dr. Ordway and the affidavit of Dr. Barrett largely consist of unsubstantiated speculation concerning the causal relationship between the subject accident and plaintiff's condition several years later (*see, Damstetter v Martin*, 247 AD2d 893, 668 NYS2d 863 [4<sup>th</sup> Dept 1998]), as well as conclusory assertions tailored to meet the statutory requirements (*see, Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]; *Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). In any event, neither Dr. Barrett nor Dr. Ordway have provided any explanation for the gap of the plaintiff's treatments more than two years ago and their recent examinations of her shortly after the filing of the defendants' motion (*see, Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Nixon v Muntaz*, 1 AD3d 329, 766 NYS2d 593 [2d Dept 2003]; *Pierre v Nanton*, 279 AD2d 621, 719 NYS2d 706 [2d Dept 2001]). While Dr. Barrett avers that plaintiff then continued to treat with her after December 2002, he does not provide any specific information as to the frequency or the dates of the alleged treatment after that date (*see, Olson v Russell*, 35 AD3d 684, 828 NYS2d 417 [2d Dept 2006]; *Williams v Ciaramella*, 250 AD2d 763, 673 NYS2d 186 [2d Dept 1998]). Plaintiff's significant gap in treatment was, in essence, a cessation of treatment which she failed to address by way of competent medical proof (*see, Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *McConnell v Ouedraogo*, 24 AD3d 423, 805 NYS2d 418 [2d Dept 2005]; *Puerto v Omholt*, 17 AD3d 650, 795 NYS2d 117 [2d Dept 2005]). Furthermore, plaintiff's subjective complaints of pain to her health care providers do not constitute a significant injury within the meaning of the statute (*see, Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; *Iglesias v Inland Freightways, Inc.*, 209 AD2d 479, 619 NYS2d 59 [2d Dept 1994]).

In addition, the proof submitted by the plaintiff is insufficient to raise a triable issue of fact that she sustained a medically determined injury or impairment rendering her unable to substantially perform all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see, Magarin v Kropf*, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; *Hernandez v DIVA Cab Corp.*, 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]; *Mercado v Garbacz*, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]). Although plaintiff alleges in her affidavit that she has difficulties lifting heavy objects and performing home improvement projects, the record lacks objective proof of any substantial curtailment of her activities within the relevant time period after the accident (*see, Nelson v Distant*, 308 AD2d 338, 764 NYS2d 258 [1<sup>st</sup> Dept 2003]; *Keena v Trappen*, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]).

Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, her claims in this regard must also be dismissed (*see, CPLR 3212 [b]*; *see, Watford v Boolukos*, 5 AD3d 475, 772 NYS2d 566 [2d Dept 2004]; *Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, defendants' motion for summary judgment is granted and the complaint is dismissed.

Dated: APR 10 2007

  X   FINAL DISPOSITION        NON-FINAL DISPOSITION

J.S.C.