

**Vasquez v Grant**

2007 NY Slip Op 30822(U)

March 14, 2007

Supreme Court, Suffolk County

Docket Number: 0028121/2004

Judge: Robert W. Doyle

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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 (*Tippling-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 199]). 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 [1st 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 Eyley*, 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 the motion and relative to plaintiff Yuliana Vasquez, defendant submits, inter alia, the pleadings; the plaintiffs' verified bill of particulars; and the affirmed report of defendant's examining orthopedist, S. Farkas, M.D. In their bill of particulars, plaintiffs claim that Yuliana Vasquez sustained a concussion as well as cervical/lumbar disc bulges and herniations. Plaintiffs also claim that Yuliana Vasquez sustained a limitation of motion and an exacerbation of all pre-existing injuries/conditions. Additionally, plaintiffs claim that Yuliana Vasquez was confined to her home for two months as a result of the accident. The Court construes these allegations to mean that plaintiff claims a serious injury in the categories of a permanent consequential limitation and a significant limitation.

In his report dated May 9, 2006, Dr. Farkas states that he performed an independent orthopedic examination of Yuliana Vasquez on May 9, 2006 and his findings include a full range of motion of the cervical and lumbar spine with no spasm or crepitus to palpation; a motor examination that was "5+"; and a negative straight leg raising test. He also noted that her deep were normal at both the Achilles tendon and the patella tendon regions. Dr. Farkas opined that plaintiff has sustained cervical and lumbar sprains which had resolved and that there was no ongoing orthopedic pathology. He also concluded that

plaintiff may carry out the normal activities of her daily activities without restriction.

In support of the motion and relative to plaintiff Rubicel Osorio, defendant submits, inter alia, the pleadings; the plaintiffs' verified bill of particulars; the affirmed report of defendant's examining orthopedist, Arthur M. Bernhang, M.D.; and the affirmed report of defendant's examining neurologist, Mark J. Zuckerman, M.D. In their bill of particulars, plaintiffs claim that Rubicel Osorio sustained contusions of the knees; cervical and lumbar disc herniations; and straightening of the cervical lordosis. Plaintiffs also claim that Rubicel Osorio sustained a limitation of motion and an exacerbation of all pre-existing injuries/conditions. Plaintiffs claim, however, that Rubicel Osorio was not confined to his home or bed as a result of his injuries. The Court construes these allegations to mean that plaintiff claims a serious injury in the categories of a permanent consequential limitation and a significant limitation.

In his report dated June 21, 2006, Dr. Bernhang states that he performed an independent orthopedic examination of Rubicel Osorio on June 14, 2006, and his findings include symmetrical knee and ankle jerks; no palpable fibromyalgia, trigger points, or spasm about the cervical musculature; a normal straight leg raising test; no palpable fluid in either knee; and no joint line tenderness of the knees. He also observed that plaintiff's knee flexion and extension were 0/0, and 130/130, compared with the normal ranges of 0/0, and 134/134. He opined that there was no orthopedic indication of any causally related injuries to the cervical spine, the lumbar spine, or the knees. Dr. Bernhang also concluded that plaintiff was capable of performing the activities of his daily living and not disabled.

In his report dated July 18, 2006, Dr. Zuckerman states that he performed an independent neurological examination of the Rubicel Osorio on that date and his findings include normal deep tendon reflexes; an intact sensory system; and a full range of motion of the cervical and lumbar spine without tenderness or spasm. He opined that this was a normal neurological examination without evidence of a peripheral or central nervous system dysfunction. Additionally, Dr. Zuckerman concluded that plaintiff had sustained cervical and lumbosacral sprains which had resolved, and that plaintiff was capable of carrying out the normal activities of his daily living.

In support of the motion and relative to plaintiff Manuel Osorio-Rojas, defendant submits, inter alia, the pleadings; the plaintiffs' verified bill of particulars; the affirmed report of defendant's examining orthopedist, S. Farkas; the affirmed report of defendant's other examining orthopedist, Arthur M. Bernhang, M.D.; and the affirmed report of defendant's examining neurologist, Mark J. Zuckerman, M.D.; In their bill of particulars, plaintiffs claim that Manuel Osorio-Rojas sustained a lesion of the humeral head of the right shoulder; cervical and lumbar disc herniations; and a loss of cervical and lumbar lordosis. Plaintiffs also claim that Manuel Osorio-Rojas sustained a limitation of motion and an exacerbation of all pre-existing injuries/conditions. Additionally, plaintiffs claim that Manuel Osorio-Rojas was confined to his home for one week and to his bed for 2 days as a result of his injuries. The Court construes these allegations to mean that plaintiff claims a serious injury in the categories of a permanent consequential limitation and a significant limitation.

In his report dated May 9, 2006, Dr. Farkas states that he performed an independent orthopedic examination of Manuel Osorio-Rojas on that date, and his findings include normal ranges of motion of the cervical and lumbar spine with no palpable spasm; a motor exam that was "5+"; and a negative

straight leg raising test. He opined that plaintiff had sustained cervical and lumbar sprains which had resolved. In addition, Dr. Farkas concluded that plaintiff had no orthopedic impairments, and that he was capable of carrying out the normal activities of his daily living without restriction.

In his report dated June 21, 2006, Dr. Bernhang states that he performed an independent orthopedic examination of Manuel Osorio-Rojas on June 14, 2006, and his findings include no winging of the scapula; a negative Hawkin's test for shoulder impingement; a negative O'Brien's test for labral tears; and a negative Yeoman's test for bicipital tendinitis. He opined that there was no objective orthopedic indication of any causally related injuries to the cervical spine, the thoracic spine, the lumbar spine, or the right shoulder. Additionally, Dr. Bernhang concluded that plaintiff was not disabled.

In his report dated July 18, 2006, Dr. Zuckerman states that he performed an independent neurological examination of Manuel Osorio-Rojas on that date, and his findings include intact motor strength; no evidence of atrophy or fasciculations in the upper or lower extremities; symmetrical reflexes; a normal sensory system; and a full range of motion of the shoulders. He also observed that there was no tenderness or spasm in the paraspinal muscles. He opined that plaintiff had sustained sprains of the cervical and lumbosacral spine which had resolved. Furthermore, Dr. Zuckerman concluded that plaintiff was capable of carrying out the normal activities of his daily living.

By her submissions, defendant made a prima facie showing that plaintiffs each did not sustain a serious injury (*see, Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Willis v New York City Transit Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]; *Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). Dr. Farkas found that Yuliana Vasquez had a full range of motion of the cervical and lumbar spine with no spasm or crepitus and he opined that she was not disabled. Dr. Bernhang found that Rubicel Osorio had no joint line tenderness or palpable fluid in the knees and he opined that plaintiff was not disabled. Also, Dr. Zuckerman found that Rubicel Osorio had a full range of motion of the cervical and lumbar spine without tenderness or spasm and he opined that plaintiff was not disabled. Dr. Farkas found that Manuel Osorio-Rojas had normal ranges of motion of the cervical and lumbar spine with no palpable spasm and he opined that plaintiff was not disabled. Additionally, Dr. Bernhang found that there were no impingements, labral tears, or bicipital tendinitis in Manuel Osorio-Rojas' shoulders and he opined that plaintiff was not disabled. As defendant has met her burden as to all categories of serious injury alleged by each plaintiff, the Court turns to their 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 these motions and with regard to Yuliana Vasquez, plaintiffs submit, inter alia, the two affirmed MRI reports of plaintiff's treating radiologist, John Himelfarb, M.D.; the personal affidavit of plaintiff's treating chiropractor, Nicholas Martin, D.C.; and the plaintiff's personal affidavit. The Court notes that Dr. Martin's affidavit is deficient to the extent that he attempts to render a medical diagnosis or prognosis which is beyond the scope of chiropractic practice (*see, Education Law § 6551; McGuirk v Vedder*, 271 NYS2d 731, 706 NYS2d 485 [3d Dept 2000]; *Crozier v Lesniewski*, 195 AD2d 657, 599 NYS2d 729 [3d Dept 1993]).

In his report dated July 27, 2004, Dr. Himelfarb states that he performed MRI studies of Yuliana Vasquez' cervical spine on July 23, 2004, and his findings include normal lordosis; a bulge at the C4-5 level; a disc herniation at the C5-6 level; and no significant stenosis. In his report dated July 29, 2004, Dr. Himelfarb states that he performed MRI studies of Yuliana Vasquez' lumbar spine on July 27, 2004, and his findings include a normal lordosis; a disc bulge at the L4-5 level; a disc herniation at the L5-S1 level; and no significant stenosis.

In his personal affidavit, Dr. Martin avers that he first treated Yuliana Vasquez on June 17, 2004, and his findings included severe muscle spasm in the cervical paraspinal muscles bilaterally, and swelling in the cervical spine. His range of motion testing showed that plaintiff had restrictions in her cervical and lumbar spine. He also noted that plaintiff had a positive distraction test which he opined was indicative of cervical nerve root compression. Dr. Martin treated plaintiff until November 28, 2005 with a variety of chiropractic modalities, including adjustments, cold therapy and orthopedic supports. On that date, he determined that plaintiff had reached maximum medical improvement even though she was still symptomatic. Dr. Martin re-examined plaintiff on October 15, 2006, and found that she continued to have restrictions in her cervical and lumbar ranges of motion, as well as a positive cervical compression test. He opined that plaintiff sustained causally related cervical and lumbosacral derangements which have resulted in a permanent, significant limitation.

In her personal affidavit, Yuliana Vasquez avers she started receiving chiropractic treatment the day after the accident, but that she stopped all treatment on November 25, 2005 because Dr. Martin had advised her that her condition would not improve. She further avers that she has difficulty lifting heavy objects, bathing her daughter, and performing housework due to pain caused by her injuries.

With regard to Rubicel Osorio, plaintiffs submit, inter alia, the two affirmed MRI reports of plaintiff's treating radiologist, John Himelfarb, M.D.; the personal affidavit of plaintiff's treating chiropractor, Nicholas Martin, D.C.; and the plaintiff's personal affidavit.

In his report dated July 27, 2004, Dr. Himelfarb states that he performed MRI studies of Rubicel Osorio's cervical spine on July 26, 2004, and his findings include straightening of the cervical spine; a posterior disc herniation at C5-6; and vertebral bodies that were normal in size and shape without any fractures. He also observed that the spinal cord appeared normal. In his report dated August 12, 2004, Dr. Himelfarb states that he performed MRI studies of Rubicel Osorio's lumbar spine on July 29, 2004, and his findings include mild right convex lumbar scoliosis; a posterior disc herniation at L5-S1; a mild, anterior marginal osteophyte at the L4-5 level; and vertebral bodies that were normal in size and shape without any fractures.

In his personal affidavit, Dr. Martin avers that he first treated Rubicel Osorio on June 17, 2004, and his findings included severe muscle spasm in the cervical paraspinal muscles bilaterally, and swelling in the cervical and lumbar spine. His range of motion testing showed that plaintiff had restrictions in his cervical and lumbar spine. He also noted that plaintiff had a positive distraction test which he opined was indicative of cervical nerve root compression. Dr. Martin treated plaintiff until November 23, 2005 with a variety of chiropractic modalities, including adjustments, cold therapy and heat therapy. On that date, he determined that plaintiff had reached maximum medical improvement

even though he was still symptomatic. Dr. Martin re-examined plaintiff on October 4, 2006, and found that he continued to have restrictions in his cervical and lumbar ranges of motion, as well as a positive heel walk test which he opined indicated nerve root compression in the lumbar spine. He opined that plaintiff sustained causally related cervical and lumbosacral derangements which have resulted in a permanent, significant limitation.

In his personal affidavit, Rubicel Osorio avers that he started receiving chiropractic treatment the day after the accident, but that he stopped treatment on November 28, 2005, at when point his no-fault benefits were terminated. He has difficulty lifting heavy objects, sleeping at night, and lifting his child. Additionally, he avers that he gets lower back pain while standing for more than half an hour.

With regard to Manuel Osorio-Rojas, plaintiffs submit, inter alia, the two affirmed MRI reports of plaintiff's treating radiologist, John Himelfarb, M.D.; the personal affidavit of plaintiff's treating chiropractor, Nicholas Martin, D.C.; and the plaintiff's personal affidavit.

In his report dated July 27, 2004, Dr. Himelfarb states that he performed MRI studies of Manuel Osorio-Rojas' cervical spine on July 26, 2004, and his findings include straightening of normal lordosis; posterior disc herniations at the C3-4, C4-5, C5-6, and C6-7 levels; and vertebral bodies of normal size without any fractures. In his report dated August 2, 2004, Dr. Himelfarb states that he performed MRI studies of Manuel Osorio-Rojas' lumbar spine on July 29, 2004, and his findings include some loss of the normal lordosis; disc herniations at the L4-5, and L5-S1 Levels; and vertebral bodies of normal size without any fractures.

In his personal affidavit, Dr. Martin avers that he first treated Manuel Osorio-Rojas on June 17, 2004, and his findings included severe swelling at C3 to C6 and L3 to L4 bilaterally, and moderate swelling in his thoracic spine at T3 to T6. He also found that plaintiff had a positive distraction test which he opined indicated cervical nerve root compression as well as a positive heel walk test which he opined indicated lumbar nerve root compression. He treated plaintiff until November 28, 2005 with a variety of chiropractic modalities, including adjustments, and inferential current therapy in the lumbar spine. On that date, he determined that plaintiff had reached maximum medical improvement even though he was still symptomatic. Dr. Martin re-examined plaintiff on October 4, 2006, and found that he continued to have restrictions in his cervical and lumbar ranges of motion, as well as a positive Heel Walk Test which he opined indicated nerve root compression in the lumbar spine. He opined that plaintiff sustained causally related misalignments to his lumbar spine which has resulted in a permanent, significant limitation.

In his personal affidavit, Manuel Osorio-Rojas avers that he started receiving regular chiropractic treatments the day after the accident throughout the Summer of 2004, but that he stopped treatment on November 28, 2005, at when point his no-fault benefits were terminated. He further alleges that he has difficulty lifting heavy objects, and that he continues to have recurrent pain in his neck and low back.

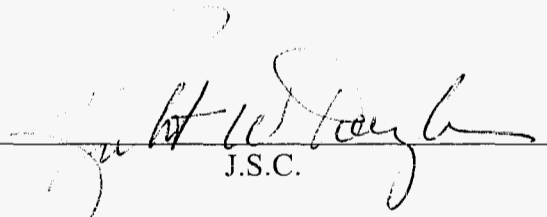
Plaintiffs have provided insufficient medical proof to raise an issue of fact that they each sustained a serious injury under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Picott v Lewis*, 26 AD3d 319, 809

NYS2d 541 [2d Dept 2006]). While a disc herniation may constitute a serious injury, each of Dr. Himelfarb's MRI reports are not probative for the purposes of demonstrating a serious injury for any of the plaintiffs because they contain no opinion as to causation (*see, Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and, additionally, these reports do not establish the extent of the alleged physical limitations resulting from the alleged disc injuries and their duration (*see, Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]). Dr. Martin's diagnoses of cervical and lumbar derangements are not explained, defined or specifically connected to plaintiffs' limitations, and their significance is not delineated (*see, Davis v Evan*, 304 AD2d 1023, 758 NYS2d 203 [3d Dept 2003]). In any event, Dr. Martin has not provided an adequate explanation for the end of his treatments rendered to plaintiffs sometime in November, 2005, and his most recent re-examination of them on October 4, 2006 (*see, Nixon v Muntaz*, 1 AD3d 329, 766 NYS2d 593 [2d Dept 2003]). Plaintiffs' gaps in treatment were, in essence, cessations of treatment which they have failed to adequately address by way of competent medical proof (*see, McConnell v Ouedraogo*, 24 AD3d 423, 805 NYS2d 418 [2d Dept 2005]; *Ketz v Harder*, 16 AD3d 930, 793 NYS2d 203 [3d Dept 2005]). Therefore, the conclusory affidavits of Dr. Martin, which were clearly tailored to meet the statutory requirements, are insufficient to establish a "serious injury" for the plaintiffs under the no-fault law (*see, Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Moreover, plaintiffs' subjective complaints of pain to their health care providers do not constitute significant injuries 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]).

Additionally, the proof submitted by the plaintiffs is insufficient to raise a triable issue of fact that they sustained a medically-determined injury or impairment rendering them unable to substantially perform all of their 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 plaintiffs allege, among other things, that they have difficulties lifting heavy objects and performing household chores, the record lacks objective proof of any substantial curtailment of their 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]).

Accordingly, the defendant's motion for summary judgment is granted and the plaintiffs' complaint is dismissed in its entirety.

Date: MAR 14 2007

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION