

Johnson v County of Suffolk

2007 NY Slip Op 31614(U)

June 7, 2007

Supreme Court, Suffolk County

Docket Number: 0013880/2004

Judge: Robert W. Doyle

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3-13-07 (004)
3-14-07(005)
ADJ. DATE 5-7-07
Mot. Seq. # 004 - MotD
005 - XMD

-----X
RICHARD JOHNSON, GEORGE JOHNSON :
and ANNETTE JOHNSON, :
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 Plaintiffs, :
 :
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 - against - :
 :
 COUNTY OF SUFFOLK, MIGUEL VASQUEZ, :
 ON TIME AUTO PARTS, LLC and MICHAEL :
 TOSCANO, :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 43 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers 16 - 30; Answering Affidavits and supporting papers 31 - 38; Replying Affidavits and supporting papers 39 - 44; 42 - 43; Other ; ~~and after hearing counsel in support and opposed to the motion~~ it is,

ORDERED that this motion (004) by defendants On Time Auto Parts, LLC and Michael Toscano for an order pursuant to CPLR 3212 granting summary judgment the issue of liability is granted and the complaint and cross claim asserted by co-defendant County of Suffolk and Miguel Vasquez are dismissed. That part of defendants' motion pursuant to Insurance Law §5102(d) and §5104(a) for an order dismissing the complaint asserting plaintiffs' injuries do not meet the serious injury threshold has been rendered academic by dismissal of the complaint and cross claim and is accordingly denied; and it is further

ORDERED that this motion (005) by defendants County of Suffolk and Miquel Vasquez for an order pursuant to CPLR 3212 and Insurance Law §5102(d) dismissing the complaint asserting plaintiff's injuries do not meet the serious injury threshold, opposed by plaintiffs, is denied.

An action was initially commenced by plaintiffs George Johnson and Annette Johnson and consolidated by order dated October 22, 2004 (Molia, J.) with a second action commenced by Richard Johnson, arising out of a motor vehicle accident which occurred on April 7, 2003, on Route 27A, at the intersection with Everdell Avenue, Town of Islip, County of Suffolk. Richard Johnson was a passenger in the vehicle operated by George Johnson, and was seated in the front passenger seat of the Johnson vehicle. Causes of action sounding in negligence have been asserted by George Johnson and Richard Johnson, with a derivative claim on behalf of Annette Johnson, spouse of George Johnson.

Defendants in motion (004) seek an order granting summary judgment on the issue of liability and rely solely upon the testimony of all parties at their examinations before trial. While the copies of the deposition transcripts of Richard Johnson, Miguel Vasquez and George Johnson submitted to the Court are unsigned and unsworn and therefore not in admissible form, no party has objected to their use on the instant motions and the Court will consider them.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [2nd Dept 1979]).

Michael Toscano testified at his examination before trial on February 24, 2006 (defendants On Time and Toscano's exhibit L) that he was involved in a motor vehicle accident on April 7, 2003. He was employed by On Time Auto Parts and was operating a station wagon used for deliveries during his course of employment when the accident occurred. The station wagon was owned by Kenny Roth, the owner of On Time Auto Parts.

He was traveling eastbound on Montauk Highway on a single travel lane. He reached the T-intersection with Everdell Road which was on his left. There was a left turn lane separating the east and westbound lanes of Montauk Highway at that intersection. He testified he turned on his left turn directional about ten feet from the intersection when he was in the turning lane, intending to turn left, and was traveling about fifteen miles an hour. He brought his vehicle to a stop with his front tires pointing slightly to the left.

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It was snowing at the time of the accident, but he testified there was less than a half inch of snow on the road, and the painted lines were visible. There were no cars in front of him. After he was stopped for about five seconds waiting to turn, he then felt an impact to the rear of his vehicle when it was struck by a bus. About forty five seconds prior to the impact, he saw a bus "back up the road" in his rear view mirror, about a mile away. He did not hear any screeching or sliding brakes or tires or the sound of any horns before the impact. The impact from the bus, which he described as heavy, occurred to the rear of his vehicle, more towards the passenger side. His vehicle was then caused to move forward and to the left about five or six feet from the impact, causing his vehicle to enter into the westbound travel lane, when a second impact occurred to his vehicle.

This second impact was from a car which was traveling westbound about thirty miles an hour on Montauk Highway. He saw the vehicle prior to impact hit its brakes and start sliding. That second impact occurred in the westbound travel lane to the front passenger portion of his vehicle when the front end of that vehicle struck his car, causing his car to move another couple of feet and hit the curb on the north side of the road. His vehicle then came to a rest about ten feet east of the intersection with Everdell, with the other car in front of him. The bus was behind him, having pulled over to the shoulder of the eastbound lane. Prior to the first impact, he did not experience any slipperiness in the roadway. His vehicle was totaled as a result of the accident.

Miguel Vasquez gave testimony at his examination before trial on February 24, 2006 (defendants On Time and Toscano's exhibit L). He stated he had been involved in an accident on April 7, 2003. He was employed by Suffolk Transit as a bus driver and was operating a large bus owned by Suffolk Transit when the accident occurred. He testified he fills out a pre-trip card every day, and at the end of the day, puts that card in a box by the gate at the bus yard. He filled out a card on the day of the accident after a pre-trip inspection, inclusive of inspecting the brakes. He testified that he had a driver's license, CDL, number two, with endorsements for the type of bus he could drive.

He testified that at the time of the accident, it was snowing heavy, a mixture of rain and snow. He was enroute from Babylon to East Patchogue, traveling in an eastbound direction on Montauk Highway. He described the car he was in the accident with as an old car, a station wagon, with no brake lights on the back. He saw a traffic light which was green from about fifteen or twenty feet from the light. He saw the car at the traffic light, but the car stayed there and did not move. His bus was "in the right side," in the line, in the eastbound lane. There were no other vehicles in front of him between his bus and the station wagon.

He saw the station wagon and the traffic light at the same time. Five seconds passed from the time he saw the station wagon until there was an impact. The station wagon was stopped and never moved before the impact. Just before the impact his foot was on the gas a little bit. When he saw the stopped station wagon, he put his hand on the horn, he "moved the power steering on the right side, trying to avoid." He testified he "couldn't see very good because of the weather-was snow heavy and the rain." He used his leg to apply the brake, "the braking put couple of times, two times, little by little."

His car traveled about ten feet from when he first applied the brakes until there was an impact. His bus was traveling about 15 to 20 miles per hour when the impact occurred. The impact occurred to the front driver's side bumper of the bus and the right rear of the station wagon. The bus stopped moving with the impact.

He did not see what happened to the station wagon after the impact. He testified he saw the station wagon "after I pull out the bus on my side, because I had to control my bus, stop my bus. And I look in the window, it was another line, westbound." He could not see the painted line in the roadway. He did not see any tire tracks in the eastbound lane in the snow indicating where the eastbound lane was, but described eastbound traffic as heavy. When asked "How, if at all, were you able to differentiate the east from the westbound lanes of travel?" he replied, "I don't know." He later testified that at the time, there was not too much traffic eastbound, most of the heavy traffic came west at the time.

He saw no other impacts or accidents other than the impact between his bus and the station wagon, but seconds later, heard another impact to his left. He also saw one more car that looked like they had been involved in an accident, but he could not see it from the window of his bus because of the weather and he did not get out of the bus. He then testified those two cars were touching and in the westbound lane. The station wagon was facing east and the other car was facing westbound. The station wagon was about ten or fifteen feet ahead of his bus after the accident. He pulled his bus to a safe place for the passengers on the eastbound side of the road near the curb to a little bus stop which was about ten feet from where the first impact occurred.

At the examination before trial of George Johnson on February 17, 2006 (defendants On Time and Toscano's exhibit F), plaintiff testified he was involved in a motor vehicle accident on April 7, 2003. He was traveling westbound on Montauk Highway and stated it was snowing pretty moderately. He did not experience any slipperiness on the roadway. He described the roadway as being one lane in each direction with a double yellow line separating the travel lanes, but he couldn't see the line because of the snow. The accident occurred at an intersection that did not have a traffic signal device. Within about five seconds before the accident, he said his rate of speed was slow, maybe fifteen or twenty miles per hour, if that. There was a car traveling westbound in front of him. While he was driving, and about four or five car lengths away, he saw a white station wagon going east in the eastbound lane of Montauk Highway. He stated the station wagon was stopped, making a turn; he had his signal on. He saw two cars pass the white car on the eastbound lane on the passenger side of the white car. There was a bus following the two cars. He first saw the bus when it was about three to four cars before the intersection. He did not know how fast the bus was traveling, but he thought the bus was moving too fast for the snow that was on the ground. The white car was stopped when he saw the bus. He did not see the contact between the bus and the white car but heard a banging noise. A few seconds later, the white car and his car came into contact with each other. When the two vehicles came into contact with each other, the white car was in George Johnson's lane of travel. At the time of the contact with the bus, the white car was not in his lane of travel. The white car came into his lane when the accident occurred. It was the drivers' front fenders and doors that came into contact on both cars. George Johnson testified that after this contact, his vehicle came into contact with a telephone pole. He did not recall hitting the telephone pole because he was knocked unconscious from the first impact when his head struck the window. He stated he regained consciousness at Good Samaritan Hospital emergency room.

Richard Johnson testified at his examination before trial on February 17, 2006 (defendants On Time and Toscano's exhibit G) that he was a passenger in his father's car on April 7, 2003 when it was involved in an accident. The accident occurred in West Islip on Montauk Highway at an intersection identified as Everdell. The windshield wipers were on to wipe off the snow. There was some accumulation of snow on the roadway. The travel lanes were divided with double yellow lines, but you could not see the roadway markings that day. There was one travel lane in each direction. He did not see the other car until within seconds before the accident. When he first saw the other car, described as a grey station wagon, it was stopped facing east on Montauk Highway waiting to make a turn with the wheels turned. It was at a complete stop. It was stopped for about 30 to 45 seconds before the contact because he said he saw it pull up and come to a stop when he was about two and one half to three car lengths away. The car he was a passenger in was moving "stop and go" because of the weather. He saw cars in the other lane traveling eastbound. There was a bus behind the grey car. The bus was moving and was about a car and a half in back of the grey station wagon which was stopped. There were no cars parked along side the roadway on either side. He said the bus was moving and it didn't brake, it hit the grey car causing it to come into the westbound lane. He did not see the impact between the bus and the grey car. He stated the front of the station wagon and the front driver's side of the vehicle he was in made contact after it was struck by the bus. He stated it kept coming and pushed their car, hitting more and more of the car on the driver's side. He did not hear any horns, banging or screeching of brakes. The car he was in got sent onto the curb to the right of them and knocked down the "name of the street pole," bent the pole and traveled beyond the pole.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2nd Dept 2003]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [2nd Dept 1999]; see also, Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation 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, and unavoidable skidding on a wet pavement or some other reasonable excuse (see, *Rainford v Han*, 18 AD3d 638, 795 NYS2d 645 [2nd Dept 2005]; *Thoman v Rivera*, 16 AD3d 667, 792 NYS2d 558 [2005]; *Power v Hupart*, supra).

Here, the adduced evidence establishes that the vehicle operated by defendant Michael Toscano and owned by On Time Auto Parts was already stopped when it was struck in the rear by the bus driven by Miquel Vasquez who worked for Suffolk Transit. Defendants Toscano and On Time Auto Parts have therefore demonstrated their prima facie entitlement to summary judgment as a matter of law.

Defendant Vasquez and the County of Suffolk have not come forward with an explanation to demonstrate that Miguel Vasquez, as the driver of the bus, was not negligent in striking plaintiff's stopped vehicle. Defendant Vasquez clearly set forth in his deposition testimony that the vehicle operated by defendant Toscano was stopped when first saw it and never moved before his bus struck it. The testimony is undisputed that Toscano's stopped vehicle had the left turn signal on while waiting to make the left turn. Although defendant Vasquez testified the stopped vehicle had no brake lights on

saw the car was stopped, his bus was traveling about 15 to 20 miles per hour when the impact occurred.

Based upon the foregoing it is determined defendants County of Suffolk and Miguel have failed to come forward with a non-negligent explanation such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse for striking the stopped vehicle. They have failed to raise any factual issues to defeat On Time's and Toscano's motion for summary judgment on the issue of liability.

It is additionally determined that plaintiffs have failed to raise a triable issue of fact concerning how On Time Auto Parts and Toscano were negligent in causing the accident. Plaintiffs have not come forward with admissible evidence demonstrating negligence by Toscano in the operation of his vehicle. The testimony is undisputed that the station wagon was stopped with its left turn signal on in the left turn lane when it was struck from the rear by the bus and pushed into oncoming traffic, thus striking plaintiff's vehicle.

Accordingly, that part of motion (004) by defendants On Time Auto Parts and Michael Toscano for an order granting summary judgment on the issue of liability is granted and the complaint, and cross claim asserted by co-defendants, are dismissed. The action is severed and shall continue against defendants County of Suffolk and Miguel Vasquez.

Turning to motion (005) wherein defendants County of Suffolk and Miguel Vasquez seek an order granting summary judgment on the issue of serious injury, it is determined that as a result of this accident, plaintiff George Johnson is claiming in his Bill of Particulars that he sustained a herniated disc at C3-4 with partial effacement of the ventral CSF space; cervical spine sprain; disc bulge at L4-5; lumbosacral spine sprain; left shoulder sprain; post traumatic headaches; post concussion syndrome with memory problems; forgetfulness and confusion; and left leg hematoma.

As a result of this accident, plaintiff Richard Johnson is claiming in his Bill of Particulars that he sustained herniated discs at L2-3, L3-4, L4-5 and L5-S1; lumbosacral spine sprain with neuritis/radiculitis; lumbago, cervicalgia, and post traumatic headaches.

Pursuant to Insurance Law § 5102(d), "[s]erious injury' means a personal injury which results in 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]).

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On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to “present evidence in competent form, showing that 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, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]).

In support of motion (004) defendants On Time Auto Parts and Michael Toscano have submitted, *inter alia*, copies of the summons and complaint; copy of the verified answer of defendants County of Suffolk and Miguel Vasquez; a copy of the bill of particulars; a copy of deposition transcripts of plaintiffs George Johnson and Richard Johnson, and defendants Michael Toscano, Miguel Vasquez; MRI report dated May 12, 2003 of George Johnson; copies of sworn letters/reports of defendants’ examining neurologist, Howard Reiser, M.D., for George Johnson and for Richard Johnson; and copies of sworn letters/reports of defendants’ examining chiropractor, Ellen-Lori Nussbaum-Blonder, D.C., for George Johnson and for Richard Johnson; copies of sworn letters/reports of defendants’ examining neurologist, Maria Audrie DeJesus, M.D., for George Johnson and Richard Johnson; and copies of signed and sworn reports/letters from defendants’ examining orthopedist Joseph Paul, M.D. for George Johnson and Richard Johnson.

In support of motion (005) defendants County of Suffolk and Miquel Vasquez have submitted, *inter alia*, a copy of the summons and complaints; copy of the verified answer of defendants County of Suffolk and Miguel Vasquez; a copy of the bill of particulars; partial copies of deposition transcripts of plaintiffs George Johnson and Richard Johnson; signed copy of a letter from DeSilva Chiropractic Office pertaining to George Johnson with annexed x-ray report dated May 20, 2003, Roentgenological Report, BAB Radiology Report dated May 13, 2003, MRI and CT scan reports of the cervical spine of George Johnson; signed copy of a letter from DeSilva Chiropractic Office pertaining to Richard Johnson with annexed MRI report of the lumbar spine; copies of sworn letters/reports of defendants’ examining neurologist, Maria Audrie DeJesus, M.D., for George Johnson and Richard Johnson; copy of sworn letters/reports of defendants’ examining neurologist, Howard Reiser, M.D., for George Johnson and Richard Johnson; sworn and signed copy of a letter from Ellen-Lori Nussbaum-Blonder, D.C. for George Johnson and Richard Johnson; copy of a signed and sworn report/letter defendants’ examining orthopedist Joseph Paul, M.D., for George Johnson and Richard Johnson;

All defendants have submitted the medical reports/letters of the same examining physicians in

support of their motions for summary judgment. In the Reply Affirmation, counsel for defendants On Time Auto Parts and Michael Toscano sets forth that they adopt those arguments and law cited by defendants County of Suffolk and Miquel Vasquez...solely as it relates to plaintiffs in this action. They, however, do not adopt those arguments with regard to that portion of defendant County of Suffolk and Miguel Vasquez's affirmation as it pertains to On Time Auto Parts and Michael Toscano's motion on the issue of liability against defendants County of Suffolk and Miguel Vasquez. Neither the Notice of Motion nor the Affirmation of counsel for defendants County of Suffolk and Miguel Vasquez set forth that they are seeking summary judgment on the issue of liability. Their motion solely seeks a determination on the issue of serious injury.

Motion (005), as it concerns plaintiff George Johnson, is considered first on the issue of serious injury. The letter dated May 8, 2006 of Dr. Reiser, defendant's examining neurologist (defendant On Time and Toscano's exhibit D), indicates George Johnson is a 45 year old right-handed male who experienced a left frontal impact while he was driving, rendering him unconscious. After receiving emergency treatment at Good Samaritan Hospital, he followed up with Dr. DaSilva, and was seen by neurologist Dr. Arto. Dr. Reiser elicited complaints of pain in George Johnson's right shoulder and proximal right upper extremity, intermittent audible snapping of his left leg with extension, tightness and pain in his lower back region-greater on the right side, intermittent nonfocal headaches.

Dr. Reiser's physical examination of George revealed his neck was supple and nontender; thoracic and lumbar regions were nontender and straight leg raising signs were negative. Cranial nerve examination revealed full visual fields, no ptosis or proptosis or Horner's syndrome; no sensory deficits were noted; deep tendon reflexes were 1-2+ and equal bilaterally in the biceps, brachioradialis, triceps, patellar jerks and Achilles jerks; Plantar responses were downgoing; station and gait were normal. Dr. Reiser states that there was no finding of neurological deficit. He stated that although the MRI of the cervical spine reportedly revealed a herniation at C3-4, there was no ongoing objective finding to correlate. There was no evidence of a lumbar nerve root involvement. CT and MRI scans of George Johnson's head were normal although he may have sustained an episode of altered consciousness. Dr. Reiser stated that based upon the history, his neurological examination and a review of the records, he does not find evidence of any objective ongoing neurological disorder causally related to the incident of 4/7/03.

The MRI of George Johnson's cervical spine revealed C3-4 and C5-6 disc desiccation with mild circumferential degenerative bulging. The MRI of his lumbar spine revealed mild age related degenerative changes at the L5-S1 disc with no evidence of trauma (defendants On Time and Toscano's exhibit H). However, the additional MRI report (defendant County and Vasquez's exhibit F) reveals a central disc herniation at C3-4 with partial effacement of the ventral CSF space, with no evidence of cord compression or foraminal stenosis.

The chiropractic report of Dr. Nussbaum-Blonder dated June 17, 2003 (defendants On Time and Toscano's exhibit I) indicated George Johnson was the driver of a car involved in a motor vehicle accident. He was taken to Good Samaritan Hospital where he complained of intermittent headache, intermittent neck, thoracic, and lower back pain, intermittent right shoulder pain, intermittent pain in

the first and second digits of the left hand, intermittent bilateral leg pain and right foot pain. He was examined, x-rayed, and diagnosed with a hairline fracture of his left leg. Upon examination, Dr. Nussbaum-Blonder states that all upper extremity deep tendon reflexes were within normal limits. Motor power of the cervical spine flexors and extensors, as well as muscles of the upper extremities were 5/5 throughout. There was normal sensation in the upper extremities. Proprioception and sensation to light touch and vibration was normal. She made the diagnosis of cervical sprain-strain syndrome, resolved; thoracic sprain-strain syndrome resolved; lumbar sprain-strain syndrome resolved; muscle tension headaches resolved and stated that it is her opinion that the motor vehicle accident of April 7, 2003 is causally related to the symptoms described, but found no objective evidence of disability. She found George Johnson was capable of engaging in normal activities of daily living and work activities without restrictions.

Dr. DeJesus also performed a neurological examination on George Johnson on June 17, 2003. She indicated in her report (defendant On Time and Toscano's Exhibit J) that he had been involved in a motor vehicle accident, sustained a loss of consciousness, was taken to Good Samaritan Hospital emergency room and was diagnosed with a hairline fracture of his left leg. The following day he came under the care of Dr. DaSylva, a chiropractor, for treatment of headaches, pain in the neck radiating to both arms, intermittent non-radiating pain in the upper back and lower back, and intermittent tingling over the dorsum of the left foot, which treatment he received three times a week. At his examination by Dr. DeJesus, George Johnson complained of daily left sided headache, intermittent pain in the neck that radiates to both arms, intermittent non-radiating pain in the upper back and lower back, and intermittent tingling over the dorsum of the left foot. Dr. DeJesus set forth in her report that the neurological examination was normal. As to range of motion examination, she stated there was full range of motion of the neck, thoracic spine, lumbar spine, right knee, right ankle. Her diagnosis was post-traumatic headaches, and status post cervical spine, thoracic spine and lumbar spine sprains. She did not review any medical records or consider the same for this examination as she states there were none available for review. Dr. De Jesus stated there was no neurological disability, no indication for a permanent neurological deficit at this time, and disability and treatment of the left fibular fracture was deferred to the appropriate specialty. She found the injuries reported were causally related to the accident. It was her professional opinion that George Johnson can work and perform all of his usual daily activities without restriction or any neurological limitations resulting from the accident.

Dr. Joseph Paul performed an orthopedic examination of George Johnson. His partial letter/report dated June 17, 2003 (defendant On Time and Toscano's exhibit J) indicates he was the seat-belted driver involved in a motor vehicle accident wherein there was an impact to the left side of his vehicle. He lost consciousness and was taken to Good Samaritan Hospital emergency room where he was x-rayed and diagnosed with a hairline fracture to the left leg. He also complained of pain in his neck, thoracic spine and right shoulder, headaches, pain and numbness radiating to the left arm and left hand, radiating tingling to the right leg, pain in the left leg and numbness to the right foot. The following day he was started on a formal treatment program by Dr. DaSylva wherein he is receiving chiropractic treatment three times a week, which helps sometimes. Dr. Paul quantified the range of motion findings relative to George Johnson's cervical spine, upper extremities, right shoulder, left hand, and right ankle. Examination of the lumbar spine revealed that the sitting

Laseque testing was negative to 80 degrees and straight leg raising to 75 degrees in both the seated and supine positions, however, lumbar range of motion measurements were quantified as within normal limits. Dr. Paul made the diagnosis of resolved sprain of the cervical and thoracic spine, resolved sprain of the right shoulder, resolved sprain of the left hand, normal examination of the left leg and left ankle, right foot and upper extremities. He stated George Johnson has no disability at this time, with no permanency as a result of the accident. Dr. Paul also stated that George Johnson was capable of working and performing all of his normal activities of daily living without any limitations, and he had no indication for further treatment from an orthopedic point of view. The last page of Dr. Paul's report is missing, but is contained in exhibit G of defendants County of Suffolk and Miquel Vasquez's motion. Dr. Paul indicates there is causality between the injuries reported and the motor vehicle accident.

Dr. DaSilva examined George Johnson on April 11, 2003 and the letter/ report (defendants County and Vasquez's exhibit F) indicates George Johnson was a machinist who was scheduled to start work on Monday following the accident. He presented with complaints of shooting, throbbing, burning and tingling pain in the neck bilaterally, with pain radiating into the head bilaterally, both shoulders and both arms; dull, aching and spastic pain in the low back bilaterally, aggravated by sitting and by lifting; numbing pain in the left shoulder brought on by lifting; and aching and throbbing left temporal headaches. Dr. DaSilva's findings upon examination are set forth in his report with quantified deficits/normal range of motion percentages for George Johnson's cervical and lumbar spine; kinesiological studies of the upper and lower extremities with grading; orthopedic testing with positive Kemps testing, positive cervical compression bilaterally, positive shoulder depression test on the left side; positive left sided Laseque Test (straight leg raising) with pain in the L5-S1 level at 60 degrees; and a positive Patrick's Test on the left side. Palpation evaluation of left and right iliolumbar muscle group of the low back disclosed moderate spasms. Left shoulder range of motion was limited in abduction with crepitus. Dr. DaSilva's record indicates the left leg was negative for fracture to the tibia and fibula, but there was a contusion to the tibia, midline with a linear area of opacity. His initial diagnosis was that of cervical strain/sprain with headache; lumbosacral strain/sprain with radiculitis; left shoulder strain/sprain. MRI of the brain revealed normal intracranial contents with no evidence of mass, hemorrhage or edema. CT scan of the cervical spine dated May 16, 2003, revealed what appeared to be a congenital abnormality involving the C2 vertebrae. MRI of the cervical spine report dated May 14, 2003 indicated central disc herniation at C3-4 with partial effacement of the ventral CSF space, without evidence of cord compression or foraminal stenosis; straightening of the cervical spine indicative of reflex muscle spasm; and a questionable fracture of the odontoid versus normal variation of an os odontoideum.

At his examination before trial (defendants On Time and Toscano's exhibit F), George Johnson testified since February, 2006, he has been employed at Air Industries as a machinist. Air Industries is a manufacturer of aircraft flight safety parts such as door latches, etc. He works twelve hours a day, five days a week. He uses a crane for lifting. Just prior to this accident, he had been working full time for Tech Precisor until December, 2002 but was laid off as work was slow. He then worked full time for TNT Precision, a commercial machining company, until February, 2004. When the accident occurred, he was to start work the following Monday at TNT in a lead man position, a supervisor, at \$18.00 an hour, but never started the job. He began working with L&F in

February, 2004. L&F is a manufacturer of aircraft parts such as motor mounts and struts. He voluntarily left his employment there because he could not physically do the lifting which he stated was too heavy, causing him pain in his back and arm. He was unable to load the bulkheads which hold the jets onto the plane. He stated it took too much out of him physically. He left there February, 2006 and began his employment at Air Industries.

This Court now turns to that part of defendant's application (005) for an order granting summary judgment on the issue of whether Richard Johnson sustained a serious injury within the meaning of Insurance Law §5102(c).

Richard Johnson was examined by neurologist Dr. Howard Reiser (defendant County and Vasquez's exhibit H) on May 8, 2006, who indicates Richard Johnson was a front seat passenger wearing a seat belt and harness at the time of a left frontal impact collision. He was taken to Good Samaritan Hospital where he was seen in the emergency department for complaints of pain in his lower back, and for which he was then treated with manipulation by Dr. DaSilva, a chiropractor. At the time of the examination, Dr. Reiser states that Richard Johnson still experiences pain in his lower back bilaterally, but is not presently under a doctor's care. He is employed as a maintenance worker full time. Dr. Reiser states that his review of the records indicates the MRI of the lumbar spine performed on May 7, 2003 reveals herniations from L2-3 through L5-S1, with no neural compression reported. Dr. Reiser states that upon examination, there are no objective findings to suggest neurological involvement in the lumbosacral region, and he finds no evidence of an objective neurological disorder causally related to the reported incident of April 7, 2003.

Dr. Maria Audrie DeJesus examined Richard Johnson on June 17, 2003 (defendants On Time and Toscano's exhibit J) and indicates that after Richard was seen in the emergency room of Good Samaritan Hospital following the accident, he was discharged and came under the care of Dr. DaSilva, D.C. for treatment three times a week for headaches and pain in the lower back. At the time of the visit, he apprised Dr. DeJesus that he experiences generalized headaches about twice a week, and intermittent nonradiating pain in his lower back with intermittent numbness in the toes of his right foot. Dr. DeJesus' examination of his cranial nerves and mental health was negative. She notes that the motor system demonstrates normal tone in both the upper and lower extremities, with normal strength of the upper extremities. She described the strength in the legs as intact, including the pelvic girdle, quadriceps, hamstrings, extensor and flexor groups of the ankles and toes, with good weight bearing. Sensation to all modalities was described as normal with no impairment of position, vibration, tactile or temperature senses. Gait was described as normal without limp or ataxia. She described the range of motion of the neck and lumbar spine as full, but did not quantify the degrees of motion. She indicated Richard Johnson complained of pain in the lumbar spine with range of motion. Bilateral straight leg raising was described as normal at 90 degrees and Patrick's and Kernig's tests are negative. Dr. DeJesus' diagnosis was that of post-traumatic headaches, status post lumbar spine sprain and normal neurological examination. There was no neurological disability found and no indication for a permanent neurological deficit, neurological care, diagnostic testing or physical therapy. She stated that it is apparent that the injuries sustained and the accident reported are causally related. It was Dr. DeJesus' opinion that Richard Johnson can work and perform all of his usual daily activities without restriction or any neurological limitations resulting from this accident.

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Richard Johnson was examined by defendants' examining orthopedist, Dr. Joseph L. Paul on June 17, 2003 (defendants On Time and Toscano's exhibit J). Dr. Paul set forth in his history that Richard Johnson's initial complaints were pain in the lower back and headaches. The next day he was seen by Dr. DaSilva who started him on a formal treatment program of chiropractic treatments three times a week. His present complaints were those of intermittent headaches and lower back pain for which he was taking no medication. Dr. Paul's examination of Richard Johnson revealed sitting Lasegue testing was negative to 80°; straight leg raising was negative to 75° in both the seated and supine positions. Range of motion of the lumbar spine revealed forward flexion, extension, right and left lateral extension were all quantified with no deficits set forth. No radiation of pain, numbness or tingling was noted on neurological examination. Dr. Paul states there were no medical records available for his review. The diagnosis was that of resolved sprain of the lumbar spine. He found no disability at this time, and opined there will be no permanency as a result of the accident. He stated Richard Johnson is capable of working and performing all of his normal activities of daily living without any limitations. He also found that there is probable causality between the injuries sustained and the accident reported.

In the transcript of the examination before trial of Richard Johnson (defendants On Time Auto Parts and Michael Toscano's exhibit G) Richard Johnson testified that he became employed with Northern American Enclosures performing maintenance about two to three months after the accident. At the time of the accident he was traveling with his father looking for a job. After the accident he said he felt like his low back was on fire. He was x-rayed at Good Samaritan Hospital where he was seen in the emergency department and later released. He thereafter followed up with Dr. DaSilva where he was treated three times a week until about the fall. An MRI was performed and Dr. DaSilva told him it showed he had four herniated discs in his pack and that something was pinching in each disc. He stopped treatment and did not go for more testing because he said his insurance was cut off. Richard Johnson testified he never suffered an injury or received treatment to his back prior to the date of the accident. When asked if there were any activities he can no longer engage in that he regularly participated in before the accident, he answered lifting weights, martial arts, sex even. He was previously involved in Shotokan, Tae Kwon Do, and kickboxing. He had received a yellow belt in Shotokan. He used to study martial arts every day and lift weights everyday before the accident. He has not lifted weights since the accident. After the accident he began attending BOCES for auto mechanics, three-three month courses for which he received a certificate for each.

Based upon the evidence submitted, it is determined that defendants County of Suffolk and Miguel Vasquez have not established prima facie entitlement to an order granting summary judgment on the issue of serious injury for either George Johnson or Richard Johnson.

Defendants have submitted the reports of Dr. Nussbaum-Blonder and Dr. DeJesus which both set forth that George Johnson sustained a hairline fracture to his left fibula. None of defendants' examining physicians have either confirmed or disputed this fracture. Dr. Paul, defendants' examining orthopedist, did not address the issue of the alleged fracture of the fibula of George Johnson's left leg, although he acknowledged George Johnson was advised he sustained a hairline fracture to his fibula.

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Defendants have submitted evidence demonstrating that the MRI of George Johnson's cervical spine indicates a questionable fracture of the odontoid versus normal variation of an os odontoideum, or the MRI of his cervical spine which reveals the herniated cervical disc at C3-4 with partial effacement of the ventral CSF space (defendant County's exhibit F).

Defendants have submitted evidence demonstrating that the MRI of Richard Johnson's back revealed four herniated lumbar discs.

None of defendants' examining physicians have disputed the findings of the MRI's for either George Johnson or Richard Johnson, and simply state there is no objective finding of disability.

Pursuant to Insurance Law §5102(d), a fracture is set forth as a serious personal injury (*Lesane v Tejada*, 15 AD3d 358, 790 NYS2d 44 [2nd Dept 2005]; *Poma v. Ortiz*, 2 AD3d 616, 768 NYS2d 336 [2nd Dept 2003]). Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (*Jankowsky v Smith*, 294 AD2d 540; 742 NYS2d 876 [2nd Dept 1998]).

Defendants have submitted evidence that George Johnson sustained possible fractures of the left fibula and the odontoid, and a herniated disc at C3-4. These submissions raise issues of fact concerning whether George Johnson sustained a serious injury. Defendants County of Suffolk and Miguel Vasquez submitted the records of Dr. DaSilva which set forth quantified limitations in range of motion to George Johnson's cervical and lumbar spine. The transcript of the examination before trial of George Johnson submitted by defendants raises factual issues concerning George Johnson being unable to perform his duties at his job due to the inability to perform the heavy lifting which caused pain in his back and arm. Therefore, defendants have failed to make a prima facie showing that the plaintiff George Johnson did not sustain a serious injury within the meaning of Insurance Law §5102(d).

Defendants have submitted evidence that Richard Johnson sustained four herniated lumbar discs. They have further submitted evidence that he is no longer able to engage in his martial arts programs or tournaments and weight lifting as a result of the accident. Dr. Paul's examination of Richard Johnson revealed sitting Lasegue testing was negative to 80° and straight leg raising was negative to 75° in both the seated and supine positions, but does not set forth the significance of this finding. He simply states that no radiation of pain, numbness or tingling was noted on neurological examination. Dr. Paul also stated there were no medical records available for his review. Defendants have failed to make a prima facie showing that the plaintiff Richard Johnson did not sustain a serious injury within the meaning of Insurance Law §5102(d).

Under these circumstances, it is unnecessary to consider whether the plaintiff's opposition was sufficient to raise a question of fact (*Coscia v 938 Trading Corp.*, 282 AD2d 538, 725 NYS2d 349 [2nd Dept 2001]). However, in reviewing plaintiffs' opposing papers, it is determined that plaintiffs have raised questions of fact sufficient to preclude an order granting summary judgment.

The affirmation of Dr. Samuel Mayerfield (plaintiff's exhibit C) affirms the findings on the

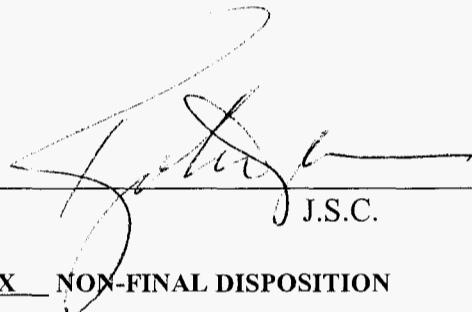
MRI of George Johnson's cervical spine which demonstrates central disc herniation at C3-4 with partial effacement of the ventral CFS space and a question of a fracture of the odontoid. Dr. DaSilva has set forth quantified objective findings of decreased range of motion in George Johnson's cervical spine, as well as the positive findings of his orthopedic examinations of the cervical spine and lumbar spine.

Dr. Mayerfield affirms the findings of the MRI of Richard Johnson which diagnosed four posterior disc herniations at L2-3, L3-4, L4-5 and L5-S-1 (Plaintiffs' exhibit E). Dr. DaSilva (plaintiff's exhibit F) has set forth quantified limitations in the range of motion of Richard Johnson's lumbar spine as well as his cervical spine. He has set forth, *inter alia*, the positive findings relating to his orthopedic evaluations and the significance of those findings.

Although defendants County of Suffolk and Miguel Vasquez argue the issue of causation in their Reply affirmation, defendants' examining physicians have related the injuries to the motor vehicle accident of April 7, 2003.

Accordingly, the County of Suffolk's and Miguel Vasquez's motion for an order granting summary judgment on the issues of whether George Johnson and Richard Johnson sustained serious injury within the meaning of Insurance Law §5102(d) is denied.

Dated: JUN 07 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION