

**Quigley v Vecere**

2007 NY Slip Op 32614(U)

August 6, 2007

Supreme Court, Suffolk County

Docket Number: 0006215/2005

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 5-15-07  
ADJ. DATE 6-18-07  
Mot. Seq. # 001 - MD

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TRACEY A. QUIGLEY,	:	LITE & RUSSELL	
	:	Attorneys for Plaintiff	
Plaintiff,	:	212 Higbie Lane	
	:	West Islip, New York 11795	
- against -	:		
	:	ROBERT P. TUSA, ESQ.	
GARY E. VECERE,	:	Attorney for Defendant	
	:	898 Veterans Memorial Hwy, Suite 320	
Defendant.	:	Hauppauge, New York 11788	
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Upon the following papers numbered 1 to 25 read on this motion for summary judgment   ; Notice of Motion/ Order to Shew Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 9 - 23 ; Replying Affidavits and supporting papers 24 - 25 ; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is.

**ORDERED** that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by the then 35 year old plaintiff when her vehicle was rear-ended by defendant's vehicle on November 15, 2004. By her bill of particulars, plaintiff alleges that as a result of the subject accident, she sustained serious injuries including, a central disc herniation at L5-S1 with anterior thecal sac effacement; pain in neck region and both shoulders; whiplash; thoracic sprain and strain; lumbar sprain and strain; cervicocranial syndrome; and headaches. In addition, plaintiff alleges that she was confined to bed and home for approximately one day and was incapacitated from employment for approximately one day.

Plaintiff seeks to recover under the serious injury categories of 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.

Plaintiff also alleges that she sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a). At the time of the accident, plaintiff was employed as a District Office Assistant for a State Assemblyman. The Court's computer records indicate that the note of issue in this action was filed on March 7, 2007.

Defendant now moves for summary judgment dismissing the complaint as against him on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of his motion, defendant submits, among other things, the summons and verified complaint; his answer; plaintiff's verified bill of particulars; plaintiff's no-fault insurance records relating to treatment with respect to the subject accident; the unsworn report dated February 18, 2005 of plaintiff's treating physician, Anthony L. Finuoli, D.O. (Dr. Finuoli), based on an examination of plaintiff on said date; the affirmed report dated June 26, 2006 of defendant's examining orthopedist, Arthur M. Bernhang, M.D. (Dr. Bernhang), based on an examination of plaintiff on June 19, 2006; the affirmed report dated June 20, 2006 of defendant's examining neurologist, Mark J. Zuckerman, M.D. (Dr. Zuckerman), based on his examination of plaintiff on said date; and the affirmed report dated December 20, 2005 of Steven L. Mendelsohn, M.D. relating to his review of the MRI of plaintiff's lumbar spine which was performed on February 10, 2005.

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 "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 (*see, 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 [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 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 [2d 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 [3d Dept 1990]).

Initially, the Court notes that defendant's attorney in her affirmation makes reference to portions of plaintiff's deposition transcript without submitting any pages of the transcript as an exhibit in support of the motion. Without the submission of the actual pages of deposition transcript, defendant's attorney, who lacks personal knowledge, cannot offer her version of plaintiff's testimony as evidence (*see, Feratovic v Lun Wah, Inc.*, 284 AD2d 368, 725 NYS2d 892 [2d Dept 2001]; *Carpluk v Friedman*, 269 AD2d 349, 704 NYS2d 94 [2d Dept 2000]).

Plaintiff's treating physician, Dr. Finuoli at Suffolk Orthopedic Associates, P.C. , examined plaintiff two months after the subject accident and indicated in his report that examination of plaintiff's cervical spine revealed tenderness along plaintiff's paracervical musculature with palpable spasm and some limitation to extreme rotation secondary to pain and that examination of plaintiff's lumbar spine showed tenderness along the paralumbar musculature with some edema. Dr. Finuoli diagnosed cervical strain, lumbar strain and L5-S1 disc herniation. Said medical report of plaintiff's treating physician, submitted in support of the motion, noted some limitation in rotation of plaintiff's cervical spine which was not adequately quantified or qualified to establish the absence of a significant limitation of motion (*see, McNulty v Buglino*, 40 AD3d 591, 836 NYS2d 198 [2d Dept 2007]).

A review of the report of defendant's examining orthopedist, Dr. Bernhang, based on his examination of plaintiff a year and a half after the subject accident, particularly with respect to consideration of the serious injury categories of permanent consequential limitation of use and significant limitation of use, revealed that the report has deficiencies. His bilateral findings with respect to cervical rotation of 80/65 showed apparent limitations when compared to one another and his bilateral findings concerning lateral flexion of the cervical spine of 40/40 was below the Average Range of Joint Motion (ARJM) provided of 43. Without a comparative quantification of those findings as to what is normal, it cannot be concluded that the ranges of motion in plaintiff's cervical spine were normal, or that any limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the no-fault statute (*see, McLaughlin v Rizzo*, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]). In addition, the standard of comparison used, ARJM, does not comport with the required comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see, Frey v Fedorciuc*, 36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]; *Powell v Alade*, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; *see also, Somers v Macpherson*, 40 AD3d 742, 836 NYS 2d 620 [2d Dept 2007]). It is to be noted that Dr. Bernhang made reference to having reviewed plaintiff's MRI performed on February 10, 2005 as well as a report with the impression of a central disc herniation at L5/S1 with anterior thecal sac effacement and another report with the impression of no evidence of disc herniation or significant stenosis, the latter of which he concurred with<sup>1</sup>. In conclusion, Dr. Bernhang opined in his report that he found no objective orthopaedic evidence of any residual of causally related injuries said to have occurred to the cervical, thoracic or lumbar spine or to either shoulder. He added that whatever soft tissue injuries plaintiff may have sustained as a result of the subject accident appeared to have resolved without residual.

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<sup>1</sup>Defendant submitted the report of defendant's examining radiologist, Dr. Mendelsohn, indicating that he reviewed the MRI of plaintiff's lumbar spine which was performed on February 10, 2005, almost three months after the accident, and found mild to moderate age related degenerative changes of the L5-S1 disc and saw no evidence of a focal disc herniation or any trauma related abnormality.

The report of defendant's examining neurologist, Dr. Zuckerman, from about the same time does not ameliorate the deficiencies found in Dr. Bernhang's report. Dr. Zuckerman's musculoskeletal examination revealed lateral flexion to the right of 30 degrees out of 30 degrees and to the left 25 degrees; cervical range of motion was 75 degrees out of 80 degrees to the left and to the right; and that plaintiff could flex 40 degrees out of 45 degrees with slight left trapezius spasm with minimal tenderness. Dr. Zuckerman concluded that plaintiff had a normal neurologic examination and diagnosed cervical sprain resolved and lumbar sprain with minimal subjective symptoms. He concluded that after a review of available records, obtaining a history from plaintiff, and performing an examination, there appeared to be a causal relationship between the sprain injuries and the subject accident. Notably, Dr. Zuckerman failed to indicate that plaintiff's lumbar sprain had resolved (*compare, Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]). Instead, his report indicated limitations in plaintiff's lumbar spine range of motion almost a year and a half after the subject accident and failed to offer any other possible origin or cause for those limitations other than the accident (*see, Sullivan v Johnson*, 40 AD3d 624, 835 NYS2d 367 [2d Dept 2007])

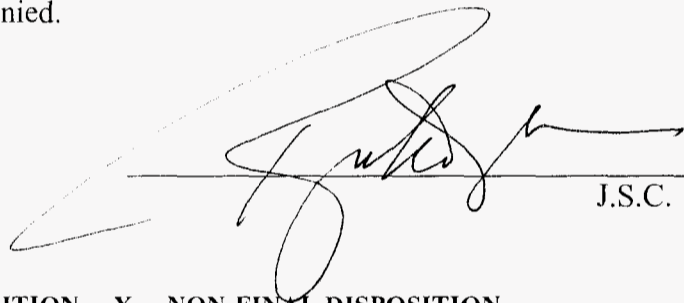
Thus, defendant's proof failed to objectively demonstrate that plaintiff did not suffer a permanent consequential or significant limitation of use of her cervical and lumbar spine as a result of the subject accident (*see, Abraham v Bello*, 29 AD3d 497, 816 NYS2d 118 [2d Dept 2006]).

Inasmuch as defendant failed to establish his prima facie entitlement to judgment as a matter of law based on whether plaintiff sustained a serious injury, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact on that matter (*see, Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]).

Accordingly, the instant motion is denied.

AUG 06 2007

Dated: \_\_\_\_\_

  
\_\_\_\_\_  
J.S.C.

\_\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION