

**Wilkes v Alpi**

2007 NY Slip Op 32665(U)

August 23, 2007

Supreme Court, Suffolk County

Docket Number: 0000531/2006

Judge: Robert W. Doyle

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among other things, the summons and complaint; their answer; plaintiff's verified bill of particulars; plaintiff's supplemental bill of particulars; plaintiff's deposition transcript; the affirmed report dated October 15, 2004 of Jay E. Wagner, M.D., an orthopedist who examined plaintiff on said date on behalf of the no-fault insurance company; the affirmed report of Cecily Anto, M.D., a neurologist who examined plaintiff on September 25, 2006; and the affirmed report dated September 25, 2006 of Joseph P. Stubel, M.D. who performed an orthopedic evaluation of plaintiff on said date.

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 objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see, Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

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 [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 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]).

Here, defendants failed to satisfy their prima facie burden of showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see, Sullivan v Johnson*, 40 AD3d 624, 835 NYS2d 367 [2d Dept 2007]; *Mullen v Lauffer*, 31 AD3d 402, 820 NYS2d 61 [2d Dept 2006]). During his deposition on July 24, 2006, plaintiff testified that at the time of the accident he had a Ph.D. in clinical psychology but was unemployed and that he had not injured his lower back or neck prior to the accident. Plaintiff testified that at the time of the accident his body rocked back and forth in the vehicle; that he did not seek medical treatment on the date of the accident but began to feel pain in his lower back, neck and shoulders within 24 hours of the accident; and that a few days later

his wife took him to the emergency room of North Shore University Hospital and that he was given prescription medications and released. In addition, plaintiff testified that he returned to the emergency room a few days later with the same complaints, he underwent x-rays and was told to see his primary care physician who, in turn, referred plaintiff to an orthopedist. According to plaintiff, the orthopedist referred him for physical therapy, which plaintiff underwent once a week until his no-fault insurance ran out in about October or November 2004. Plaintiff added that at the time he did not have health insurance of his own. Later, in about April 2005 when plaintiff had health insurance, he went to see a neurologist and complained of a decrease in coordination causing him to fall. Plaintiff explained that the neurologist sent him to have MRI's performed and that the neurologist performed an EMG test and reported to plaintiff that he had nerve damage to his lumbar spine, which could not be corrected by surgery. Plaintiff last saw the neurologist in 2005. Plaintiff also testified that at the time of the deposition he no longer had health insurance and was no longer receiving treatment because he could not afford it. When asked what he could no longer do, plaintiff responded that he could no longer sleep in a bed but slept every night in a recliner, that he could no longer do the housework that he used to do such as bending to remove the dishes from the dishwasher and bending down to do the laundry and that he had trouble walking and sitting in a chair for long periods of time. Plaintiff noted that his neck and shoulder no longer bother him, just his back.

The results of an orthopedic examination by Dr. Wagner almost four months after the subject accident reveal that plaintiff was complaining of intermittent low back pain and posterior neck pain extending into the posterior shoulder areas. Dr. Wagner indicated in his affirmed report that examination of the cervical spine revealed full cervical flexion and extension with minimal restriction of rotation to the right and left and full range of motion of the upper extremities at all joints with some posterior neck pain with elevation and abduction of the shoulders. In addition, Dr. Wagner indicated that his examination of plaintiff's lumbar spine revealed flexion of 45 degrees; lumbar extension 20 degrees; and right and left lateral bend 20 degrees, with discomfort noted at the end of the range of motion. Dr. Wagner also recorded that straight leg raising was positive on the right at 70 degrees and positive on the left at 90 degrees. He added that there was full range of motion of the lower extremities and that motor power was normal and deep tendon reflexes were bilaterally symmetrical. In conclusion, Dr. Wagner diagnosed cervical and lumbosacral sprains causally related to the accident and advised physiotherapy and massage therapy twice a week for six weeks and thereafter a home exercise program. He opined based on his evaluation plaintiff that plaintiff was able to work as a psychologist, that plaintiff's prognosis was good and that plaintiff was able to perform the activities of daily living.

When Dr. Stubel performed an orthopedic examination of plaintiff almost two years and three months after the subject accident, he noted plaintiff's complaints to be lower back pain and indicated the results of his examination of plaintiff's lumbar spine to be forward bending to 45 degrees (normal 90 degrees); lateral flexion to 30 degrees (normal 30 degrees) bilaterally; and lateral rotation to 60 degrees (normal 60 degrees) bilaterally. He added that there was no reported tenderness and no palpable muscle spasm. In addition, Dr. Stubel indicated that straight leg raising was positive on the right leg at 45 degrees (normal 80 degrees). He also indicated that there was a decrease in pinprick sensation in the L3 distribution. Dr. Stubel diagnosed low back sprain and opined with a reasonable degree of medical certainty that plaintiff's current symptomology overlays pre-existing osteoarthritic changes and that plaintiff displayed some mildly positive findings with reference to the subject accident and injuries. He concluded that plaintiff could perform his usual activities of daily living and could perform sedentary

work such as psychoanalysis.

The conclusion of defendants' examining orthopedist Dr. Stubel that plaintiff "displayed some mildly positive findings" was belied by his findings of substantial limitations in range of motion in the plaintiff's lumbar forward bending and positive straight leg raising which existed more than two years after the subject accident (*see, Jenkins v Miled Hacking Corp.*, \_\_\_ NYS2d \_\_\_, 2007 WL 2247276, 2007 NY Slip Op 06350 [NYAD 2 Dept Aug 07, 2007]). In addition, his opinion relating to causation was conclusory inasmuch as it failed to explain which of plaintiff's injuries were attributable to pre-existing osteoarthritic changes and which were caused by the accident (*see, id.*; *see also, Abbadessa v Rogers*, 40 AD3d 665, 836 NYS2d 633 [2d Dept 2007]).

Dr. Anto performed a neurological examination of plaintiff on the same date that Dr. Stubel examined plaintiff and noted in his affirmed report that plaintiff complained of low back pain and loss of balance from decreased coordination in the legs and difficulty in walking. Dr. Anto also noted that plaintiff told him that his neck symptoms were better and that plaintiff had a history of a right foot fracture as a young man. Dr. Anto indicated that his neurological examination showed plaintiff to be alert and oriented, with normal memory and speech and normal cranial nerve examination. However, his motor examination revealed grade 4/5 weakness of left hip flexion, knee extension and hamstrings and sensory examination revealed decreased sensation over the right L4 distribution. Dr. Anto further indicated that examination of the cervical spine showed flexion and extension 45 degrees (normal 45 degrees), lateral flexion 30 degrees to the right and left (normal 45 degrees), and lateral rotation 60 degrees to the right and left (normal 80 degrees). For the lumbar spine, Dr. Anto noted that lumbar flexion was limited to 45 degrees. Dr. Anto added that plaintiff's straight leg raising was negative bilaterally but that plaintiff complained of pain in the hamstrings on the right at 90 degrees. In conclusion, Dr. Anto diagnosed lumbar disc herniation with L4 radiculopathy and resolved cervical strain and mentioned that the L4 radiculopathy was causing some weakness, sensory loss and reflex changes in the right lower extremity.

Notably, defendants' examining neurologist Dr. Anto provided no opinion regarding causation, that is, whether the lumbar disc herniation with L4 radiculopathy and recorded symptoms were or were not causally related to the subject accident (*see generally, Kearsse v New York City Trans. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; *Gray v Lasurdo*, 302 AD2d 560, 755 NYS2d 627 [2d Dept 2003]). In addition, Dr. Anto merely noted that plaintiff's lumbar flexion was limited to 45 degrees without comparing it 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 Aladz*, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; *see also, Somers v Macpherson*, 40 AD3d 742, 836 NYS 2d 620 [2d Dept 2007]). Without a comparative quantification of said finding as to what is normal for lumbar flexion, it cannot be concluded that the ranges of motion in plaintiff's lumbar 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]).

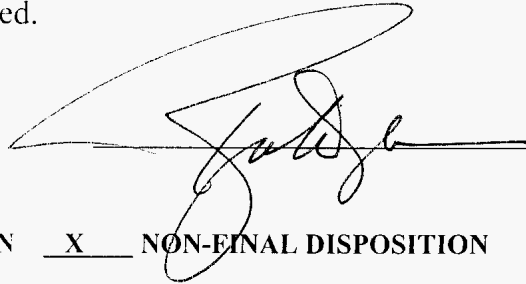
Thus, defendants' proof failed to objectively demonstrate that plaintiff did not suffer a permanent consequential or significant limitation of use of his lumbar spine as a result of the subject accident (*see, Abraham v Bello*, 29 AD3d 497, 816 NYS2d 118 [2d Dept 2006]; *see also, Bentivegna v Stein*,

\_\_\_ NYS2d \_\_\_, 2007 WL 2192075, 2007 NY Slip Op 06266 [NYAD 2 Dept Jul 31, 2007]).

Inasmuch as defendants have failed to establish their 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.

Dated:     AUG 23 2007    

  
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J.S.C.

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