

**Wallace v Sperl**

2007 NY Slip Op 32751(U)

September 4, 2007

Supreme Court, Suffolk County

Docket Number: 0028915/2003

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT OF THE STATE OF NEW YORK**  
**IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

**HON. JEFFREY ARLEN SPINNER**

Justice of the Supreme Court

<b>JEANETTE WALLACE and STAN WALLACE,</b>  <div style="text-align:right">Plaintiffs,</div> <p style="text-align:center">- against -</p> <b>LUCAS SPERL and FRANK J SPERL,</b>  <div style="text-align:right">Defendant.</div>	<b>INDEX NO.:</b> 2003- <sup>28915</sup> <del>2891</del>  <b>MOTION SEQ. NO.:</b> 001 - MD <b>ORIG. MOTION DATE:</b> 04/25/07  <b>MOTION SEQ. NO.:</b> 002 - MG <b>ORIG. MOTION DATE:</b> 06/06/07  <b>FINAL SUBMIT DATE:</b> 06/27/07
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UPON the following papers numbered 1 to 34 read on these Motions:

- Defendants' Motion 001 (Pages 1-14 & Exhibits A-N);
- Plaintiff's Cross-Motion 002 (Pages 15-26 & Exhibits A-L);
- Defendants' Reply (Pages 27-34);

it is,

**ORDERED**, that the application of Defendants is hereby denied in all respects; and the application of Plaintiffs is hereby granted to the extent set forth herein below.

Defendants move this Court (001) for an Order, pursuant to CPLR 3211 and 3212 granting Summary Judgment in favor of Defendants, dismissing Plaintiffs Summons and Complaint.

Plaintiffs move this Court (002) for an Order, pursuant to CPLR 3211 and 3212 granting Summary Judgment in favor of Plaintiffs.

This action arises from claims to recover damages for personal injuries allegedly sustained by Plaintiff JEANETTE WALLACE as the result of an automobile accident that occurred on August 2, 2002, on Terry Road, approximately 60-80 feet from its intersection with Smithtown Boulevard, in the Town of Smithtown, County of Suffolk, State of New York. Said Plaintiff's vehicle, which was stopped in traffic, was struck in the rear by a vehicle operated by Defendant LUCAS SPERL, who testified that he lost control of the vehicle just prior to striking the rear of said Plaintiff's vehicle.

Defendants' Motion herein (001) seeks Summary Judgment on the alleged grounds that Plaintiff JEANETTE WALLACE suffered no "serious injuries" as defined in New York Insurance Law. Insurance Law § 5102(d) sets forth nine specific ways in which Plaintiff can establish that she suffered such an injury:

"Serious injury" means 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.”

The term “significant”, as it appears in the statute, has been defined to mean “something more than a minor limitation of use” (*Licari v Elliot*, 57 NY2d 230 [1982]). The Plaintiff must demonstrate not only the extent or degree of limitation, but also its duration (*Beckett v Conte*, 176 AD2d 774 [1991], *app. Den.* 79 NY2d 753). The duration of the injury must be more than “fleeting” (*Partlow v Meehan*, 155 AD2d 647 [1989], *lv. App. Dis.* 76 NY2d 770). The term “consequential” has been defined to mean important or significant (*Kordana v Pomelitto*, 121 AD2d 783 [1986], *app. Dis.* 68 NY2d 848). A “permanent loss” of use of a body organ, member, function or system must be total (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff's loss of range of motion or give a “qualitative assessment of a plaintiff's condition ...provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system” (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *rearg den Manzano v O'Neil*, 98 NY2d 728).

That leaves the ninth and final category with which to sustain her claim for serious injury: 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 their usual and customary daily activities for not less than 90 days during the 180 days immediately following occurrence of the injury or impairment. In order to prosecute a claim for serious injury pursuant to this category under Insurance Law § 5102(d), Plaintiff is required to show something more than slight curtailment of the material acts which constitute their usual and customary daily activities, and must support that claim with medical proof attributing such impairment to a ‘medically determined’ injury (*Giaddy v Eyley*, 79 NY2d 955 [1992] (Plaintiff must prove they were “curtailed from performing... usual activities to a great extent rather than some light curtailment”); *Thompson v Abasi*, 788 NYS2d 48, 2005 NY App Div LEXIS 23 [1 Dpt 2005] (“When construing the statutory definition of a 90/180-day claim, the words ‘substantially all’ should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment”); *Sigona v New York City Transit Authority*, 255 AD2d 231 [1 Dpt 1998]).

Plaintiff must demonstrate that the motor vehicle accident prevented her from performing a substantial part of her usual and customary daily routine for 90 out of the 180 days immediately following the accident (*see: Pierre v Nanton*, 279 AD2d 621 [2 Dpt 2001] (ruling that although Plaintiff claimed he did not work for almost four months after the accident, there was no serious injury because he was not ordered by a doctor to stay home); *Curry v Velez*; 243 AD2d 442 [2 Dpt 1997]. Furthermore, in order to sustain a claim for serious injury, Plaintiff is required to establish “competent proof connecting the condition to the accident” (*Rose v Furgerson*, 281 AD2d 857 [3 Dpt 2001]; *see also Ceglian v Chan*, 283 AD2d 536 [2 Dpt 2001] (holding that objective proof is required that the subject accident was the cause of the disc injuries).

Furthermore, to grant summary judgment, it must clearly appear that there are no material issues of fact (*see, Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387 [1957]). 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 (*see, Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]; *Sillman v Twentieth Century-Fox Film Corp, supra*).

Once a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact is shown, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (*see, Zuckerman v City of New York, supra*).

In order for opposing parties to avoid the granting of summary judgment, they must show real and substantial facts sufficient to entitle her to defend the action in question (*see, Strasburger v Rosenheim*, 234 AD 544, 255 NYS 316 [1 Dept 1932]). They must show that they have a *bona fide* defense to the action, one which they may be able to establish. It must be a plausible ground for defense, something fairly arguable and of a substantial character. It must be shown by affidavit or other competent proof. They cannot shelter themselves behind general or unspecific denials, or denials of knowledge or information sufficient to form a belief. They must show that their denial or defense is neither false nor sham but interposed in good faith and not for dilatory purposes (*see, Famous Realty v Frindel*, 135 NYS2d 261, 264 [Sup Ct 1954], *quoting Dwan v Massarene*, 19 AD 872, 192 NYS 577, 582).

Here, both parties make convincing arguments regarding their positions, which serves to defeat Defendants Motion, requiring a trial of the facts in order to establish whether Plaintiff JEANETTE WALLACE suffered “serious injuries” pursuant to New York Insurance Law, and the extent of her damages. Therefore, Defendants’ Motion must be denied.

As to Plaintiffs’ Motion for Summary Judgment on the alleged grounds that the underlying motor vehicle accident was a rear-end collision, the Court notes that, when a vehicle is struck in the rear, absent some excuse, it is negligence as a matter of law (*See, Rich v O’Connor*, NYLJ 03-03-1995, p 34, c 2 [2 Dept]; *Mead v Marino*, NYLJ 06-28-1994, p 31 c 1 [2 Dept]; *Edney v MABSTOA*, 178 AD2d 398; *DeAngelis v Kirschner*, 171 AD2d 593, 567 NYS2d 454 [1 Dept 1991]; *Crociata v Vasquez*, 168 AD2d 419, 562 NYS2d 536; *Cohen v Terranella*, 112 AD2d 264, 491 NYS2d 711 [2 Dept 1985]; *Carter v Castle Elec Contr*, 26 AD2d 83, 271 NYS2d 51 [2 Dept 1966]). The occurrence of a rear end collision is sufficient to create a *prima facie* case of liability (*Crociata v Vasquez, supra; Benyarko v Avis*, 162 AD2d 572 [2 Dept 1990]). Where it is indisputable that the first vehicle was struck in the rear by the second, even where it is alleged that said first vehicle stopped short, the Court has ruled that such speculation is insufficient to defeat a motion for summary judgment, and that a rear end collision is sufficient to create a *prima facie* case of liability (*See, Levine v Taylor*, 268 AD2d 566, 702 NYS2d 107). Any operator of a motor vehicle approaching another motor vehicle from the rear is responsible for maintaining a reasonably safe rate of speed and control over their vehicle, and to exercise reasonable care to avoid collision with the other vehicle (*See, Bucceri v Frazer*, 297 AD2d 304, 746 NYS2d 185 [2 Dept 2002]).

Furthermore, in light of Defendant LUCAS SPERL’s testimony, Plaintiff’s Motion must be granted.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

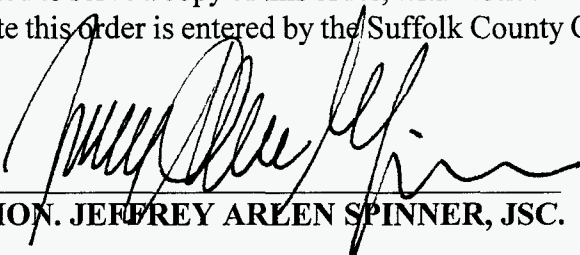
**ORDERED**, that the application of Defendants(001) for an Order, pursuant to CPLR 3211 and 3212

granting Summary Judgment in favor of Defendants, dismissing Plaintiffs Summons and Complaint, on the issue of serious injury, is hereby denied in all respects; and it is further.

**ORDERED**, that the application of Plaintiffs (002) for an Order, pursuant to CPLR 3211 and 3212 granting Summary Judgment in favor of Plaintiffs on the issue of liability, is hereby granted, and this matter shall move forward expeditiously to trial on the issue of damages; and it is further

**ORDERED**, that Counsel for Plaintiffs is hereby directed to serve a copy of this order, with Notice of Entry, upon all other parties within twenty (20) days of the date this order is entered by the Suffolk County Clerk..

**Dated: Riverhead, New York**  
**September 4, 2007**



**HON. JEFFREY ARLEN SPINNER, JSC.**

FINAL DISPOSITION	✓ NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

**TO:**

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