

**Garner v Dale Transp. Corp.**

2007 NY Slip Op 32995(U)

September 13, 2007

Supreme Court, Nassau County

Docket Number: 3234-03/

Judge: James P. McCormack

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SHORT FORM ORDER

SUPREME COURT- STATE OF NEW YORK  
Present: HON. JAMES P. McCORMACK, Acting Justice of the Supreme Court

TRIAL/IAS, PART 51  
NASSAU COUNTY

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DAMON GARNER, JAMIE JOHNSON, an infant  
by his mother and natural guardian SHARON  
JOHNSON and SHARON JOHNSON individually,

Plaintiff(s),

-against-

Index No.: 003234/03  
Motion Seq. No.: 001  
Submission Date: 7/25/07

DALE TRANSPORTATION CORP., HOWARD  
KATZ, MICHELE VEVANTE, "JOHN/JANE  
DOE 1" and "JOHN/JANE DOE 2",  
Defendant(s).

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The following papers read on this motion:

- Notice of Motion/Memorandum of Law.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....

Motion by defendants Dale Transportation Corp. and Howard Katz for an order pursuant to CPLR § 3212 granting summary judgement on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §§ 5102(d) is denied to the extent hereinafter provided.

This action was brought by plaintiff Jamie Johnson, an infant by his mother and natural guardian Sharon Johnson, to recover money damages for what are alleged to be

serious physical injuries sustained by him in an automobile accident which took place on March 4, 2000, on Route 24 at its intersection with Route 106, East Meadow, New York. Jamie Johnson was a passenger in the motor vehicle owned and operated by Damon Garner which was involved in a three car collision with a vehicle owned by defendant Dale Transportation Corp and operated by defendant Howard Katz and a separate vehicle owned and operated by Michele Vevante. The plaintiff's Bill of Particulars alleges the infant plaintiff was caused to sustain permanent personal injuries including, *inter alia*, cervical derangement; cervical myalgia; restricted range of motion of cervical spine; cervical nerve root compression; lumbar derangement; lumbar nerve root compression; lumbar myalgia; restricted range of motion of the lumbar region. (Defendant's Notice of Motion Exhibit "C").

Insurance Law 5102(d) defines "serious injury" as a personal injury which results in among other things "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 (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment."

With regard to the statutory categories of “permanent consequential limitation” and “significant limitations of use”, the Court of Appeals has stated that whether a limitation of use or function is “consequential” or “significant” relates to “medical significance” and involves a “comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part” (*Toure v. Avis Rent A Car Systems*, 98 NY 2d 345, 353[2002]). Additionally, the doctor’s opinion as to the medical significance of the injury must be supported by objective medical evidence, such as an MRI or CT scan, or the observation of muscle spasms during the physical examination. *Id.*

On a motion for summary judgement, it is defendant’s burden to present a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a matter of law (*Schultz v. Von Voight*, 86 NY 2d 865[1995]). If defendant makes that showing the burden shifts to plaintiff to come forward with sufficient evidence to overcome defendant’s motion by demonstrating that he/she sustained a serious injury under the No-Fault Law (*Gaddy v. Eycler*, 79 NY 2d 955[1992]). Thus, the question of whether plaintiff suffered a serious injury is not always a question of fact which requires a jury trial (*Licari v. Elliot*, 57 NY 2d 230, 237[1982]). However, where plaintiff submits objective evidence as to “the extent of the limitation of movement,” a factual issue will be presented (*Id.* at 238-239).

In support of their motion for summary judgement dismissing the complaint, defendants submit an affirmed medical report of two physicians Wayne Kerness, M.D., an orthopedic surgeon who examined plaintiff on November 28, 2006 as part of an independent medical evaluation and Warren Cohen, M.D., a neurologist who examined plaintiff on November 28, 2006 as part of an independent medical evaluation.

Dr. Kerness, in preparation for his examination of the plaintiff reviewed numerous medical records of the plaintiff which were outlined in his affirmed report. Dr. Kerness noted the plaintiff was a now 19 year old male standing 6'1" tall and weighing 200 lbs in no apparent distress. The cervical spine was negative for tenderness paraspinals, tenderness suprascapular, and spasm. Range of motion testing of the cervical spine revealed flexion to 45 degrees (45 degrees normal), extension to 45 degrees (45 degrees normal), right lateral flexion to 45 degrees (30-45 degrees normal), left lateral flexion to 45 degrees (30-45 degrees normal), right rotation to 60 degrees (60 degrees normal), and left rotation to 60 degrees (60 degrees normal). Examination of the lumbar spine revealed no spasms or tenderness. The Lasegue was negative. Supine straight leg raise was negative on the right and left. Reverse seated straight leg raise was negative on the left and right. Range of motion of the lumbar spine reveals flexion to 90 degrees (90 degrees normal), extension to 30 degrees (30 degrees normal), right and left lateral flexion to 30 degrees (30 degrees normal), and right and left rotation to 30 degrees (30 degrees normal).

The conclusion reached by Dr. Kerness after his exam was that plaintiff was suffering from cervical and lumbar sprain/strain. Those findings were echoed by Dr. Warren Cohen, a neurologist who also examined the plaintiff on November 28, 2006. In preparation for the exam of the plaintiff Dr. Cohen reviewed numerous medical records which were outlined in his affirmed report.

Dr. Warren Cohen noted that testing of the thoracic spine revealed the following: foraminal compression/spurling test was negative, Jackson's compression test was negative, shoulder depression test was negative, Soto-Hall test was negative, cervical distraction test was negative. There was no tenderness, trigger points or spasm. Range of motion testing of the cervical spine revealed flexion to 45 degrees (45 degrees normal), extension to 45 degrees (45 degrees normal), right lateral flexion to 45 degrees (30-45 degrees normal), left lateral flexion to 45 degrees (30-45 degrees normal), right rotation to 60 degrees (60 degrees normal), and left rotation to 60 degrees (60 degrees normal). Thoracic spine movement was within normal excursion and without pain. No spasm or tenderness noted. Testing of the lumbar spine revealed the following: Bechterew/sitting boot test was negative, straight leg raising supine was negative right and left. Straight leg raising sitting was negative left and right. Kernig test was negative left and right. There was no lumbar tenderness, sacral tenderness, trigger points, or spasm. Range of motion testing of the lumbar spine reveals flexion to 90 degrees (90 degrees normal), extension to

30 degrees (30 degrees normal), right lateral flexion to 30 degrees (30 degrees normal), left lateral flexion to 30 degrees (30 degrees normal).

The conclusion reached by Dr. Warren Cohen after his exam was that plaintiff had post cervical and lumbar sprain/strain which was resolved and he stated there was no disability at this time.

The defendant has established, through the affirmed report of Drs. Kerness and Cohen, a *prima facie* case that plaintiff's injuries were not serious within the meaning of Insurance Law § 5102. (*Chatah v. Iglesias*, 5 AD 3d 160; *Ziegler v. Ramadhan*, 5 AD 3d 1080). Accordingly, the burden now shifts to the plaintiff to demonstrate a serious injury. (*Attanasio v. Lashley*, 223AD 2d 614)

In opposition to the motion, plaintiff has submitted an affirmed medical report of Dr. Frank Cohen (Plaintiff's Exhibit C), which states the plaintiff suffered a severe and permanent partial disability as documented by continued losses to lumbar ranges of motion and persistent pain syndrome. He stated the losses and pain were permanent and he did not expect any further improvements with either time or treatment. In addition, he stated the plaintiff has sustained a significant loss of use and/or limitation of motion of a bodily function, or system, or member and continues to experience residual pain and loss of use and limitation of motion. .

Dr. Frank Cohen most recently examined plaintiff on June 8, 2007, seven years after the accident, and at that time found plaintiff continued to exhibit symptoms of lower

back injury. Specifically, Dr. Cohen found, *inter alia*, while conducting range of motion testing, that the extension was limited to 20 degrees; there was a Thirty-three (33) percent limitation upon extension of the lumbar spine; and physical examination of the lumbar spine revealed tenderness and muscle spasm..

In conclusion, Dr. Frank Cohen opined that plaintiff has suffered a severe and permanent partial disability as documented by continued losses to lumbar ranges of motion, and persistent pain syndrom. These losses and the resulting pain syndromes are permanent. He expected no further improvement with time or treatment. He also stated the plaintiff had sustained a significant loss of use and/or limitation of motion of a bodily function or system, or member and continues to experience residual pain and loss of use and limitation of motion.

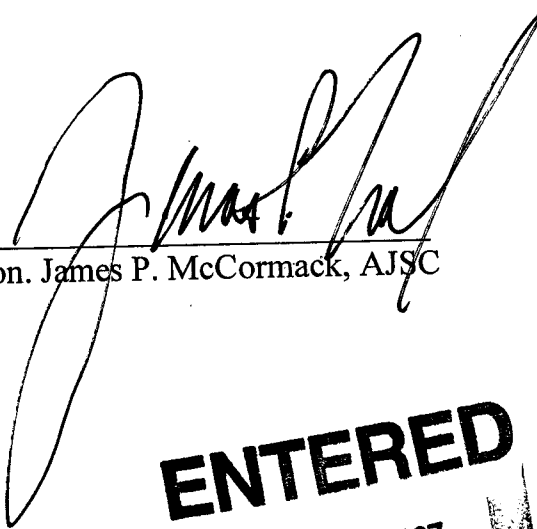
Dr. Frank Cohen 's findings contained in his affidavit report lead this court to conclude that the plaintiff has met his burden of presenting sufficient evidence in admissible form as to present a triable issue of fact as to the serious nature of his injuries. The plaintiff herein has submitted objective medical evidence of having sustained lumbar derangement and chronic active symptomatic post-traumatic subluxation complex with IVF and nerve root compression, lumbar myospasms together with objective tests showing a decreased range of motion in the lumbar spine of a sufficient quality as to preclude summary judgement. (*Toure v. Avis Rent A Car Systems, supra; Ejzerman v. Cruz, 309 AD 2d 893; Salomon v. Hadco, 1 AD 3d 426; Espinoza v. Dinicola, 8 AD 3d*

225). Specifically, this court concludes that plaintiff has presented sufficient evidence as to at least two No-Fault thresholds: 1) significant limitation of use of a body function or system and 2) significant limitation of use of a body organ or system.

Accordingly, the defendant's motion is denied in all respects.

This decision constitutes the order of this court.

Dated: September 13, 2007



Hon. James P. McCormack, AJSC

**ENTERED**  
SEP 21 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE