

Day v Sheffield

2007 NY Slip Op 33677(U)

November 5, 2007

Supreme Court, Suffolk County

Docket Number: 0008556/2004

Judge: Robert W. Doyle

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In the context of the plaintiff's claims, the term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use" (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). For this purpose, the plaintiff must demonstrate not only the extent or degree of the limitation but also its duration (*Beckett v Conte*, 176 AD2d 774, 575 NYS2d 102 [1991], app. den. 79 NY2d 753, 531 NYS2d 281). The duration of the injury must be more than "fleeting" (*Partlow v Meehan*, 155 AD2d 647, 548 NYS2d 239 [1989]). The term "consequential" means important or significant (*Kordana v Pomellito*, 121 AD2d 783, 503 NYS2d 198 [1986], app. dis. 68 NY2d 848, 508 NYS2d 425). A "permanent loss" of use of a body organ, member, function or system must be total (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [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, 746 NYS2d 865, 868 [2002]; rearg. den. *Manzano v O'Neil*, 98 NY2d 728, 749 NYS2d 478).

Generally, 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 the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1992]). "It is well settled that the proponent of a motion for summary judgment under the no-fault statute must submit admissible evidence demonstrating that a plaintiff did not sustain a serious injury as defined by Insurance Law § 5102[d]" (*Fitzmaurice v Chase*, 288 AD2d 651, 652, 732 NYS2d 690, 691 [2001]; see, *Barbarulo v Allery*, 271 AD2d 897, 707 NYS2d 268 [2000]). Once the 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 [1991]). 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 [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 [1990]).

The defendant has submitted in support of the motion, inter alia, copies of the pleadings, the plaintiff's verified bill of particulars, the deposition testimony of the plaintiff, the deposition testimony of the defendant, the plaintiff's unsworn medical treatment records consisting of a discharge summary on St. Catherine of Siena Hospital (Hospital) stationery signed by Dr. Mohammed Azaz (discharge summary) and a report of consultation on St. Catherine of Siena Hospital stationery signed by Dr. Mark Zuckerman dated August 6, 2003 (consultation report) and the sworn report of defendant's expert, Dr. Mathew M. Chacko (Dr. Chacko), dated September 21, 2006. The discharge summary and the consultation report, although unsworn, are admissible on the motion (*Abrahamson v Premier Car Rental*, 261 AD2d 562, 691 NYS2d 83 [1999]; *Pagano v Kingsbury*, supra)

The plaintiff avers in the complaint that the subject accident occurred on August 6, 2003 at the intersection of Route 25 (Main Street) and Bellemeade Avenue. The plaintiff further avers in the complaint that as a result of this accident she sustained serious injuries as defined in Insurance Law Section 5102[d] or economic loss greater than basic economic loss.

The plaintiff avers in her verified bill of particulars that she sustained, as a result of the accident, inter alia, “left basal ganglia hemorrhage with surrounding edema/cerebral bleed/thalamic hemorrhage”, confusion and disorientation, mild weakness of the right hand, sinus bradycardia, dysphagia, various degrees of aphasia, urinary incontinence and dyspraxia (Motion, Exhibit C, page 2). The plaintiff further avers that these injuries were either caused or aggravated by the subject accident, that, although prior to the accident she lived independently, that after the accident she sustained limitation of motion and loss of use and function which resulted in her inability to dress, shower, ascend stairs by herself and in her limited ability to walk, that she was confined to the hospital from the date of the subject accident to August 15, 2003 and after that date confined to a nursing home, that, although she was not employed at the time of the accident, she has been totally disabled since the accident, that she has sustained economic loss greater than basic economic loss and that she is claiming the serious injury categories of significant limitation, and permanent consequential limitation. The plaintiff also avers in the bill of particulars that immediately prior to the accident she was traveling north on Bellemeade Avenue and the defendant’s vehicle was heading south on Bellemeade Avenue when he attempted to turn left in order to proceed in an easterly direction on Route 25. The plaintiff avers that at the time of the accident her vehicle came into contact with the front of the defendant’s vehicle.

Dr. Zuckerman, a neurologist, stated in the “HISTORY” portion of the consultation report that the plaintiff had been involved in a motor vehicle accident and since there was no apparent injury she was brought home by two men. After the plaintiff arrived home, the plaintiff’s granddaughters, who lived next door, observed that she was “somewhat confused”, was not “really answering” and had a change in speech (Motion, Exhibit G, page 1). Dr. Zuckerman also noted in the report that a CT scan of the brain ordered at the Hospital revealed an abnormality. He further noted that prior to the accident the plaintiff had high blood pressure but otherwise was well and lived independently. Dr. Zuckerman observed, upon his physical examination, that the plaintiff had comprehensive and receptive difficulties, expressive problems, paraphasic errors and confusion as to her place of residence, the names of her grandchildren and as to what month and year it was. His further examination revealed no signs of head trauma or edema, a regular sinus heart rhythm in the “40s” and blood pressure at 156/53. Dr. Zuckerman opined “LEFT BASAL GANGLIA THALAMIC HEMORRHAGE MOST LIKELY SECONDARY TO HYPERTENSION; IT MAY HAVE PRECEDED HER ACCIDENT , BUT I DON’T BELIEVE IT WAS CAUSED BY THE ACCIDENT AS THE CONFUSION AND DYSPHASIA IS MOST LIKELY SECONDARY TO *THE STROKE* [sic] THE PATIENT HAS UNDERLYING HIGH BLOOD PRESSURE AND IS SHOWING SINUS BRADYCARDIA, PROBABLY SECONDARY TO BETA BLOCKERS” (Motion, Exhibit G, page 2 [emphasis added]).

Dr. Azaz stated in the history portion of the discharge summary that, although the plaintiff was not injured in the subject accident, she was a “poor historian” and admitted to the Hospital for confusion. Her past medical history indicated that she had hypertension. Dr. Azaz noted in the laboratory data section of the report that the EKG noted a normal sinus bradycardia and a cat scan of the brain showed the existence of a left basal ganglia hemorrhage. Upon physical examination, although Dr. Azaz noted that the plaintiff was awake, alert, oriented and not in acute distress, he also noted that she did not know the date and had mild right hand weakness. The plaintiff was admitted to the intensive care unit where she was evaluated by Dr. Zuckerman. Her dysphagia persisted together with a small amount of disorientation. Dr. Azaz concluded that the plaintiff’s condition on discharge was status post basal ganglia and thalamic hemorrhage and hypertension.

Dr. Chacko, a neurologist, averred in his report dated September 21, 2006 that he examined the plaintiff on the same date. In the "HISTORY" portion of his report Dr. Chacko stated that he was informed by the daughter of the plaintiff that following the accident the plaintiff was admitted to the Hospital for three to four days and then went for rehabilitation at a nursing home. At the time of Dr. Chacko's examination the plaintiff was staying at the St. James Plaza Nursing Home. The plaintiff's daughter indicated that her mother had memory loss, confusion and difficulty walking. Upon conducting the physical examination, Dr. Chacko noted ten to twenty degree deficiencies in cervical range of motion for flexion, extension, lateral rotation and lateral flexions. The cranial nerve examination revealed mild right-sided facial weakness and the motor examination showed that the plaintiff could move all extremities voluntarily. Strength testing and lumbar range of motion testing could not be done adequately in that the plaintiff was unable to cooperate. Dr. Chacko's impression of the plaintiff's condition was "Status post left basal ganglia hemorrhage with residual symptoms of confusion, disorientation, and difficulty (sic) ambulation" (Motion, Exhibit H, page 3). Dr. Chacko noted that Dr. Zuckerman in his report of August 6, 2003 had stated that this hemorrhage may have preceded the subject accident. Dr. Chacko found that the plaintiff exhibited total disability and that she was not able to work or perform normal activities of daily living without assistance. Dr. Chacko concluded that it was his opinion that "she [the plaintiff] does not require any further neurological care as it relates to the accident of 8/6/03" (Ibid. [bracketed material added]).

The plaintiff testified at her deposition that before the accident she lived alone, took care of her house, went shopping at different stores once or twice a week, drove her car and did not need a walker. On the day of the accident she did not have high blood pressure, but before the accident one of her doctors told her that she did have high blood pressure. On the day of the accident, and prior to the accident's occurrence, she felt well and did not suffer from dizziness or headaches. Earlier in the day she did not feel any numbness. During the accident her head did not strike the windshield nor did her body hit the interior of her car. After the accident and after she arrived home she did not have a headache or pain, but she did experience dizziness. She could not recall being in a health care facility other than the St James Plaza (St James). She cannot cook her own meals, does not know what medications she is taking and could not recall what activities she participates in at the St James. Generally, since the accident she cannot remember things and has lost control of her bladder. She no longer has dizziness but does have strength in both hands and arms. The plaintiff further testified that since being at the St James she needed to use a walker because she could stand up without it.

The defendant contends on this branch of his motion that the plaintiff's alleged injuries do not fall within any of the serious injury categories defined in Insurance Law 5102[d] and, alternatively, that the plaintiff's injuries were not caused by the subject accident and, alternatively, that the plaintiff has not submitted medical proof demonstrating that she met the serious injury threshold as to the significant limitation category. With regard to these contentions the Court notes initially that the defendant does not meet his initial burden on the motion by pointing to gaps in the plaintiff's proof (*George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 585 NYS2d 894 [1992]). In any event the defendant had failed to specifically address in his moving papers the serious injury category of permanent consequential limitation which was alleged in the plaintiff's bill of particulars (*Wiegand v Schunck*, 294 AD2d 839, 741 NYS2d 360 [2002]).

With regard to the defendant's contention that the plaintiff's injuries do not constitute a serious injury as defined in Section 5102[d] of the Insurance Law, the evidence adduced by defendant tends to demonstrate that the "left basal ganglia hemorrhage with surrounding edema/cerebral bleed/thalamic hemorrhage"¹ alleged in the bill of particulars resulted in more than a minor limitation of use of a body function or system and continued for a significant period of time following the accident. Dr. Zuckerman noted in his report that, although the plaintiff lived well and independently prior to the accident, he noted on examination that she had comprehensive and receptive difficulties, dysphasia² and confusion. Dr. Azaz noted that on discharge from the Hospital that the plaintiff still suffered from dysphagia³ and was diagnosed with status post basal ganglia and thalamic hemorrhage. Dr. Chacko, approximately three years later, described the plaintiff as having memory loss, confusion, difficulty with walking and significant deficiencies in cervical ranges of motion.⁴ He concluded that the plaintiff was totally disabled and could not work or perform normal activities of daily living without assistance. Moreover, the plaintiff has alleged in the bill of particulars that since the day of the accident she has been confined in either the Hospital or in a nursing home. She testified at her deposition that she was well, except for perhaps hypertension, and self sufficient, but that after the accident she suffered from significant memory loss, inability to walk without assistance and urinary incontinence. These injuries raise a triable issue of fact with regard to the existence of a serious injury (*see, Jenkins v Miled Hacking Corp.*, 43 AD3d 393, 841 NYS2d 317 [2007]) and, if proven, could rise to the level of a significant limitation (Cf. *Knoll v Seafood Express*, 17 AD3d 233, 793 NYS2d 391 [2005], *aff. on other grounds* 5 NY3d 817, 803 NYS2d 25).

With regard to the defendant's contention that the subject accident was not the cause of the plaintiff's injuries, Dr. Zuckerman noted in his report that the plaintiff exhibited speech deficits and confusion when she arrived home after the accident and that a post-accident CT scan of the plaintiff's brain showed an abnormality. His conclusion did not rule out the possibility that the hemorrhage or stroke was caused by the subject accident. Dr. Chacko, while alluding to Dr. Zuckerman's opinion as to causation, does not render his own opinion as to whether the subject accident was the cause of the plaintiff's injuries. His opinion that the plaintiff does not require further neurological care as it related to the subject accident is vague and does not specifically address the issue of causation. Dr. Chacko also fails to address other injuries alleged by the plaintiff in her bill of particulars such as sinus bradycardia and dysphagia, which relate to the permanent consequential limitation category.

Defendant having failed to meet his prima facie burden of demonstrating either that the plaintiff did not sustain a serious injury or that the subject accident was not the cause of the plaintiff's injuries, that branch of his motion for dismissal of the complaint on the ground that the plaintiff did not sustain a

¹ Dr. Zuckerman appears to refer to this condition as a stroke.

² Dysphasia is defined as an impairment of speech arising from a brain lesion (Taber's Cyclopedic Medical Dictionary, Tenth Edition, page D-55).

³ Dysphagia is defined as an inability or difficulty in swallowing (Taber's Cyclopedic Medical Dictionary, Tenth Edition, page D-55).

⁴ Although Dr. Chacko ascribed the cervical range of motion deficiencies to degenerative changes in the plaintiff's cervical spine, he does not state whether these degenerative changes preceded the subject accident.

serious injury as defined under Insurance Law Section 5102[d] is denied. The Court now turns to that portion of the defendant's motion seeking dismissal of the complaint on the ground that his conduct, as a matter of law, was not negligent.

The defendant testified at his deposition that on the day of the accident he was driving a Chevy pickup truck. The accident occurred in the early afternoon at the intersection of Bellemeade Avenue and Jericho Turnpike (Intersection). Prior to the accident he had parked his truck on Bellemeade Avenue facing southbound toward Jericho Turnpike and parallel to James Crest Florist (Florist). Florist was located at the northwest corner of the Intersection and he had parked near the middle of the building. After dropping off materials at Florist he entered his truck and pulled out onto Bellemeade Avenue heading in a southbound direction. After traveling two to three car lengths he then stopped at a traffic light at the Intersection because the light was red. When he stopped his truck there were no vehicles stopped in front of him. Bellemeade had two lanes of traffic, one being for southbound traffic and the other for northbound traffic. There was a line or lines separating these lanes. The defendant further testified that after the light turned green he waited until cars, which had come from the shopping center parking lot and were turning left in front of his vehicle, to pass by. After two to four cars vehicles had passed by and the turning traffic had "opened up" (Motion, Exhibit E, page 17) he started to move up toward the Intersection in order to make a left hand turn onto Jericho Turnpike. Jericho Turnpike had one eastbound lane and one westbound lane of traffic. He moved up about the length of his truck or a car length to the middle of the Intersection and the place of impact. The defendant testified that he told the police who had responded to the scene of the accident that he had pulled up to onto Jericho Turnpike and then waited for traffic to clear and then after that he moved up "a little bit more" (Ibid. page 20) to make the left hand turn. He also told the police that "I thought there was room in between, realized there wasn't, I stopped and a car came out of the parking lot across the intersection and into the front of my truck" (Ibid.). He told the police that this was his "best recollection" of how the accident occurred (Ibid.). His directional signal was on from the time he left the parking spot to at least where he started to make the left hand turn. The defendant also testified that after being stopped at the light he proceeded forward only a couple of feet because cars were still turning and coming out of the parking lot. He then drove another distance forward and stopped again. He could not recall how far this distance was. He believed that he had not driven his truck further into the Intersection than the imaginary line which would have separated the east and west bound lanes of the Jericho Turnpike.

The defendant further testified that the other vehicle involved in the accident was a four door white sedan which he saw before the accident. He first saw the white sedan as it was coming out of the shopping center and heading in a northbound direction toward the Intersection. The white sedan continued in a northerly direction straight across the Intersection and the east bound lane of the Jericho Turnpike until it collided with the front of his truck which had stopped. Finally, the defendant testified that the plaintiff did not have directional signals on.

The plaintiff testified that on the day of the accident the weather was nice. She was driving a Thunderbird and was heading home after shopping at Waldbaums. After she left the parking lot of Waldbaums she was driving up the hill and the other vehicle involved in the accident was driving down the hill toward her. She intended to proceed straight. She could not recall if there were any traffic lights, if the accident occurred at the Intersection, how the accident or impact occurred, speaking with the police or anything about the scene of the accident including whether any lines separated the northbound and

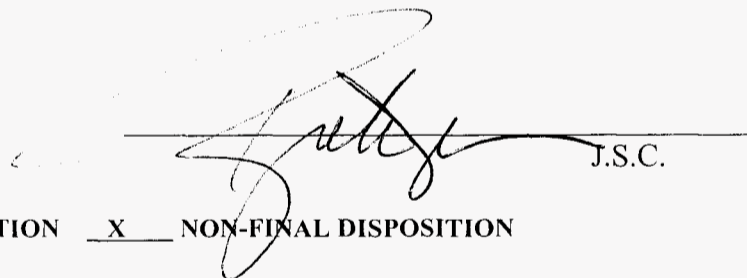
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southbound lanes of Bellemeade Avenue. Although generally she could not recall where the defendant's car was proceeding, she did recall that prior to the accident she was going straight in her lane of travel and defendant's vehicle was going the other way straight toward her. While the defendant's vehicle was not in her lane, she could not recall if it came over into her lane. She also could not recall if her vehicle went into the defendant's lane prior to the accident. The left front portion of her car was involved in the accident and she consumed no alcoholic beverage in the twenty four hour period preceding the accident.

The defendant's own testimony presents inconsistent versions as to how his vehicle proceeded after the traffic light at the Intersection had turned green to the point of impact with the plaintiff's vehicle. Furthermore, defendant's testimony does not rule out the possibility that the defendant's vehicle was not properly positioned or aligned in the Intersection, thereby becoming a contributing factor to the accident (*see*, Vehicle and Traffic Law, Section 1160[b]; *Rogoff v Hilgerman*, 16 AD2d 1030, 230 NYS2d 172 [1962]). Although the plaintiff's testimony revealed she had little recollection of the position of the respective vehicles immediately prior to the accident, she did recall that after leaving the parking lot at Waldbaums she had intended to and was proceeding straight on Bellemeade and that, at least for some distance prior to the accident she was traveling in her own lane on Bellemeade Avenue. Accordingly, the defendant has failed to meet his prima facie burden of demonstrating that he is entitled to judgment as a matter of law on the issue of liability (*Crisano v Spellman*, 294 AD2d 392, 741 NYS2d 738 [2002]).

In any event, the plaintiff has tendered, inter alia, the sworn statement of Dana Peclone (Peclone), an eyewitness. Peclone averred that she was sitting in the eastbound lane of Main Street in Middle Country Road in Smithtown stopped at a red light. She further averred that the northbound and southbound traffic was "crossing and turning" (Affirmation in Opposition, Exhibit 1). She observed a green pickup truck attempting to turn east onto Main Street and a white Thunderbird proceeding straight in a northbound direction. Both of these vehicles hesitated to go and then both went resulting in a head-on collision. Peclone also averred that the white car was further toward the middle of Main Street and the pickup was in the eastbound turning area. Accordingly, even if the defendant had met his burden of proof, the plaintiff has submitted proof which raises a triable issue of fact as to whether the defendant operated his vehicle in a non-negligent manner (Vehicle and Traffic Law, Section 1141; *Carpenter v Rapini*, 35 AD3d 1202, 830 NYS2d 398 [2006]). Since the defendant has failed to demonstrate his entitlement to relief on either branch of his motion, his motion for summary judgment dismissing the complaint is denied.

Dated: NOV 05 2007


 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION