# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN *Justice* PART 22

BYUNG UI YOO and JANE KWON

- v -

LLOYD L. FALES, GEORGE S. SHAW and JAMES M. GILBERT, SR.

INDEX NO. 116549/05

MOTION DATE 10-24-07

MOTION SEQ. NO. 003

MOTION CAL. NO. 100

The following papers, numbered 1 to 10, were read on this motion by defendant George Shaw for summary judgment on the issue of liability, and the cross-motions of defendants Lloyd Fales and James Gilbert, Sr. for summary judgment on the issue of liability and on the ground that plaintiff Yoo did not sustain a serious injury as defined by Insurance Law §5102(d).



| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits | 1 |
| Notices of Cross-Motion - Affidavits — Exhibits | 2,3 |
| Affirmations In Opposition | 4,5,6 |
| Replying Affidavits (Reply Memo) | 7,8,9,10 |

Cross-Motion: ■ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that the motion of defendant Shaw is granted, and it is further,

ORDERED that the cross-motions of defendants Fales and Gilbert are granted to the extent that they seek summary judgment on the issue of liability, and it is further,

ORDERED that those branches of the cross-motions which seek summary judgment on the ground that plaintiff Yoo did not sustain serious injury as defined by Insurance Law §5102(d) are denied as moot, and it is further,

ORDERED that the Clerk shall enter judgment in favor of the defendants, dismissing the complaint in its entirety.

This constitutes the Decision and Order of the Court.

Dated: November 26, 2007

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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BYUNG UI YOO and JANE KWON,

Plaintiffs,

-against-

Index No.
116549/05

LLOYD L. FALES, GEORGE S. SHAW and JAMES M. GILBERT, SR.,

Defendants.

----------X



**HON. DEBORAH KAPLAN, J.:**

This action arises out of a multi-vehicle accident involving all of the parties. According to the evidence, on September 7, 2004, defendant James H. Gilbert, Sr. (Gilbert) lost control of his vehicle and hit a guardrail on a 96th-Street ramp of the West Side Highway, which was very slick with oil. Plaintiff Byung Ui Yoo (Yoo) was also driving on the ramp, with his wife, plaintiff Jane Kwon (Kwon). Due to the slickness of the road surface, Yoo was unable to stop his vehicle, and collided with Gilbert's car even though he tried to stop. Defendants Lloyd L. Fales (Fales) and George S. Shaw (Shaw) each saw, in turn, a multi-vehicle accident in front of them on the ramp, but were also unable to stop their cars before becoming involved.

Yoo was injured, and went to see a doctor on September 15, 2004. At that time he presented with complaints of headaches,

dizziness, and neck and back pain with extremity radiating pain and paresthesia. Yoo was diagnosed with cervical and lumbosacral disc herniations that the doctor, Dr. Ki Y. Park, determined were causally related to the accident, and permanent in nature. After a course of treatment ending on December 2, 2004[1], Yoo allegedly discontinued seeing Dr. Park because his no-fault insurance had run out. Yoo Affidavit, ¶3. Yoo was next examined by Dr. Park, two-and-a-half years later, on May 25, 2007. No affidavits have been submitted pertaining to Kwon's injuries.

Yoo and Kwon brought this action against defendants for their respective injuries and damage to Yoo's vehicle. Defendants Fales and Shaw have counterclaimed for contribution and/or indemnification against each other. Shaw moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any cross claims. The remaining defendants each cross-moved for summary judgment.

Summary judgment is governed by CPLR 3212. Thus, the defendants, as movants, must make a prima facie showing of entitlement to judgment as a matter of law by demonstrating the absence of any material issues of fact. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006). If defendants

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[1]This date is according to Dr. Park's Affirmation (¶7). Yoo has affirmed, however, that his treatment continued until December 22, 2004. Yoo Affidavit, ¶3.

make such a showing, the burden then shifts to plaintiffs to demonstrate the existence of "facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." Schneider v Kings Highway Hosp. Ctr., 67 NY2d 743, 744 (1986) (citation omitted); Mazurek, 27 AD3d at 228. "[S]ummary judgment is inappropriate where ... competing inferences may reasonably be drawn as to whether defendants' conduct constituted negligence." Myers v Fir Cab Corp., 64 NY2d 806, 808 (1985); Rennie v Barbarosa Transp., 151 AD2d 379, 379 (1st Dept 1989).

Here, the unchallenged evidence, including that of plaintiff, is that due to unavoidable skidding, none of the drivers was able to stop his vehicles before becoming involved in the collision. The police accident report states that the ramp was "oil-soaked," and the condition was reported to the Department of Transportation. Also Shaw (Shaw Deposition, at 32), Fales (Fales Deposition, at 18), and Gilbert (Gilbert Deposition, at 16) all report that the road was too slick to stand upon. Unavoidable skidding, as a matter of law, is a sufficient explanation to rebut the inference of negligence that normally arises from a rear-end collision. Power v Hupart, 260 AD2d 458 (2nd Dept 1999); Barile v Lazzarini, 222 AD2d 635, 636 (2nd Dept 1995).

Plaintiffs nonetheless assert, relying on Power (260 AD2d at

458) and Vehicle and Traffic Law §1129(a), that the negligence of the defendants and the causation of the accident by that negligence may be inferred, because a driver is bound to exercise reasonable care not to speed, and must maintain a safe distance between vehicles. Plaintiffs also maintain that there is an issue of fact as to whether the oily condition of the roadway was a substantial factor in the cause of the accident.

These arguments are unavailing. Both Yoo and Kwon testified that after Yoo's car collided with Gilbert's car, and before the subsequent collisions, neither of them saw any vehicles approaching. See Yoo Deposition, at 25; Kwon Deposition, at 18. There is, thus, no evidence, or potential evidence, that any of the defendants was speeding at the time of the accident. Moreover, there is no question of fact as to whether the vehicles that collided with Yoo's car were traveling too closely because both Yoo and Kwon testify that there were some twenty to thirty seconds between subsequent collisions. See Yoo Deposition, at 25-27; Kwon Deposition, at 24-26.

In any event, even construing the evidence as flexibly as possible (Pfaffenbach v White Plains Express Corp., 17 NY2d 132, 136 [1966]), it is beyond cavil that where an accident is one that might naturally occur from causes other than a defendant's negligence, such as an oily road, an inference of negligence based solely upon the speed of the vehicle is not fair and

reasonable. See e.g. Cole v Swagler, 308 NY 325, 331 (1955); McCloud v Marcantonio, 106 AD2d 493, 495 (2nd Dept 1984) (even if defendant was speeding, evidence that the conduct was a proximate cause of the accident must be adduced).

Here, it is well established that there may have been other causes leading to the accident. Despite their status as non-movants on this motion, plaintiffs do not enjoy a "lower standard of proof because [they are] unable to give [their] version of the accident." Rosado v Kulsakdinun, 32 AD3d 282, 284 (1st Dept 2006). As a result, any direct claims against defendants for Kwon's injuries are dismissed.

With regard to Yoo, nevertheless, plaintiffs cite New York State Insurance Law §5102, under which, due to Yoo's alleged loss of limb function, they may be entitled to recover, regardless of fault, because he suffered "serious injury."[2] Defendants maintain that Yoo's injuries are not serious, and, in any event, the plaintiffs have failed to explain, as required under Pommells v Perez (4 NY3d 566 [2005]), the two-and-a-half-year gap in Yoo's treatment from December 2, 2004 to May 25, 2007.

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[2]NY Insurance Law Section 5102(d) defines "serious injury" as "a personal injury which results in [,inter alia,] ... 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."

While the court is cognizant that the 'gap in treatment' defense is judicially, and not legislatively created (see e.g. Panchmia v Tauber, 3 Misc 3d 849 [Civ Ct, Queens County 2004]), under Pommells, a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," indeed must offer some reasonable explanation for having done so. Pommells, 4 NY3d at 574; DeLeon v Ross, ___ AD3d___, 844 NYS2d 36, 38 (1st Dept 2007). Plaintiffs concede that an unexplained gap in treatment is fatal to a case claiming serious injury, but, citing Black v Robinson (305 AD2d 438 [2nd Dept 2003]), they maintain that Yoo discontinued treatment because his insurance coverage ran out, and that this inferential inability to pay for treatments is sufficient to obviate the requirement that the gap be explained. This argument is unsound.

In Black v Robinson (305 AD2d at 439-440), the plaintiff did testify that she underwent therapy for six months until her insurance monies ran out, but also showed, as noted by the court (but not by plaintiffs here) that she "thereafter returned to her general practitioner provided by the HIP center [emphasis added]." Thus, Black does not, as plaintiffs suggest, substantiate the excuse of a lapse in insurance as a viable explanation for a gap in treatment.

Moreover, the Court of Appeals decided Pommells after the Appellate Division, Second Department's decision in Black. To

the extent that Black could be convoluted to allow for Yoo's proffered excuse, that effort would be obviated by the pronouncement that even where there is objective medical proof of injury, a gap in treatment may make summary dismissal appropriate. Pommells, 4 NY3d at 571.

In any event, Yoo's bare excuse is insufficient as a matter of law. Yoo, at the very least, was required to explain why he could not have continued treatment under other coverage, or why he could not have paid for his treatments out of pocket. "Absent such substantiation, the reason proffered by plaintiff for discontinuing treatment remains conclusory and nonprobative." Gomez v Ford Motor Credit Co., 10 Misc 3d 900, 903 (Sup Ct, Bronx County 2005).

Here, there is no other explanation offered for Yoo's two-and-a-half-year gap in treatment. And while there is evidence that Dr. Park considered Yoo's injuries to be of a permanent nature (Park Affirmation, ¶¶6, 12), there is no indication, for instance, that Yoo was instructed to continue treatments at home because office treatments offer no chances for improvement of his condition. Compare Pommells, 4 NY3d at 576-578 (where doctor acknowledges permanent nature of injury and that visits would be only palliative, plaintiff is not required to incur the additional expense of treatment merely to establish seriousness); see also Rubensccastro v Alfaro, 29 AD3d 436 (1st Dept 2006)

(passenger failed to establish serious injury, despite physician's testimony on permanent injury, in light of unexplained 18-month gap in medical treatment); Joseph v Layne, 24 AD3d 516 (2nd Dept 2005).

Also, Yoo discontinued treatment within three months of the accident, and next sought care two-and-a-half years later. It is established that an affirmation, given years after treatment, that offers an explanation of why treatment would not have been effective, is not entitled to deference. See Brown v City of New York, 29 AD3d 447 (1st Dept 2006) (victim's cessation of treatment six months after accident could not be excused by doctor's affirmation four years later); Gonzalez v Beale, 37 AD3d 278 (1st Dept 2007) (where chiropractor treated plaintiff for seven months after accident, but plaintiff received no treatment for ensuing four years, permanent and partially disabling limitations diagnosis insufficient to show serious injury). Thus, it is doubtful that an affirmation by Dr. Park would be sufficient to overcome the inference from Yoo's discontinued treatment that his injuries were not "serious."

As defendants have demonstrated entitlement to judgment notwithstanding the provisions of NY Insurance Law, Article 51, and plaintiffs have failed to demonstrate that Yoo suffered serious injury as contemplated under that statute, or as required under Pommells (4 NY3d at 566), the complaint and all cross-

claims should be dismissed.

Accordingly, it is hereby

**ORDERED** that the motion and cross motions of defendants for summary judgment is granted and the complaint is dismissed with cost and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the cross claims are dismissed as moot; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Dated: Nov. 26, 2007

Enter:

Deborah K.

J.S.C.

DEBORAH A. KAPLAN

FILED

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NEW YORK

COUNTY CLERK'S OFFICE