

**Harrington v Ultra HD Co., LLC**

2007 NY Slip Op 33954(U)

November 28, 2007

Supreme Court, New York County

Docket Number: 0105691/2005

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN  
*Justice*

PART 22

MARK HARRINGTON and PETRONILA  
HARRINGTON

INDEX NO. 105691/05

MOTION DATE 8-29-07

- v -

MOTION SEQ. NO. 002

ULTRA HD COMPANY, LLC and ISRAEL B.  
BORUCHIN

MOTION CAL. NO. 69

The following papers, numbered 1 to 4, were read on this motion by the plaintiffs for summary judgment on the issue of liability and cross-motion by defendants for summary judgment on the issue of whether plaintiffs sustained a "serious injury" within the meaning of Insurance Law §5102(d).

Notice of Motion— Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

Cross-Motion:  Yes  No

**FILED**  
DEC 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED	
1, 2	_____
3	_____
4	_____

I. Factual and Procedural Background

On July 8, 2004, plaintiffs vehicle was stopped on the Northern State Parkway in Nassau County, when a vehicle operated by defendant Israel B. Boruch and owned by Ultra HD Company LLC struck them in the rear.

The plaintiffs commenced the instant action, seeking damages for injuries they allegedly sustained in the accident. Plaintiffs now move for summary judgment on the issue of liability. Defendants cross-move for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

II. The Motion for Summary Judgment on "Serious Injury"

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v

Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Where, as here, defendants seeks summary judgment on the threshold “serious injury” issue under “No-Fault threshold” issue (Insurance Law § 5102[d]), they bear the initial burden of establishing the absence of a “serious injury” as a matter of law. This is because, in enacting Insurance Law §5102(d), the Legislature intended to weed out frivolous claims and limit recovery to significant injuries arising from motor vehicle accidents. See Pommells v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Licari v Elliot, 57 NY2d 230 (1982).

If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, *supra*; Alvarez v Prospect Hospital, *supra*; Winegrad v New York Univ. Med Ctr., *supra*; Zuckerman v City of New York, *supra*. The party opposing a motion for summary judgment on the threshold “serious injury” issue must come forward with objective proof of their injury to raise a triable issue. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, 79 NY2d 955 (1992).

Additionally, where the plaintiffs claim serious injury under the “90/180” category of Insurance Law §5102(d), they must (1) demonstrate that their usual activities were curtailed during the requisite time period and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in their daily activities. Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, *supra*.

In this case, the defendants have produced evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. Specifically, they produced the pleadings, the affirmed reports of Dr. Frederick S. Mortati, a board certified neurologist, Dr. Frank M. Hudak, a board certified orthopedic surgeon and the unaffirmed reports of Dr. Patricia Kelly, a radiologist and Dr. Paul Yerys, an orthopedic surgeon. Unaffirmed medical reports are normally inadmissible (Grasso v. Angerami, 79 N.Y.2d 813 (1991); Pagano v. Kinsbury, 182 A.D.2d 268 (2<sup>nd</sup> Dep’t 1992); CPLR 2106), however, if a defendants doctor refers to unaffirmed reports in their affirmation, the reports are properly before the Court. Bent v. Jackson, 15 A.D.3d 46 (1<sup>st</sup> Dept. 2005); Brown v. Achy, 9 A.D.3d 30 (1<sup>st</sup> Dept. 2004).

### III. Defendants Medical Examinations of Plaintiffs'

Dr. Mortati performed a neurological examination of Mark Harrington on August 3, 2006 after reviewing his prior medical records. In his report, Dr. Mortati concludes plaintiff's neurologic examination was normal, and that he suffered bilateral carpal tunnel syndrome, right meralgia paresthetica (which he states is of no clinical significance) and possible mild underlying sensory peripheral neuropathy, secondary to diabetes.

Dr. Hudak performed an orthopedic examination of Mark Harrington on August 14, 2006 and reviewed his prior medical records. Dr. Hudak performed a number of objective tests of plaintiff's upper and lower extremities, cervical and lumbar spine, all of which are described in his report and all of which revealed a normal range of motion as compared to the stated norm. He concludes that plaintiff suffers from pre-existing degenerative disc disease with a foraminal narrowing, disc herniation at C5-C6 and lumbosacral sprain. He adds that plaintiff has developed lumbosacral and cervical radiculopathy from the degenerative disc disease but has no objective findings of disability related to the subject accident.

Defendants also submit Dr. Kelly's x-rays and MRI reports of Mark Harrington. The x-ray of the cervical spine revealed straightening of the cervical lordosis and mild degenerative changes at C6-C7. The lumbosacral and thoracic spine x-ray revealed degenerative osteoarthritis. The MRI of the cervical spine revealed disc herniations at C5-C6 with associated foraminal stenosis, disc bulges at C3-C4, C4-C5 and C6-C7 with foraminal stenosis and joint hypertrophy and mild degenerative changes at C5-C6 and C6-C7. The MRI of the lumbosacral spine revealed disc bulges at L3-L4 and L4-L5 with associated spinal stenosis.

Dr. Mortati examined Petronila Harrington on August 3, 2006. After reviewing her medical records and performing a neurological examination, Dr. Mortati concludes that her examination was normal and she did not sustain any neurological pathology.

Dr. Hudak examined Petronila Harrington on August 21, 2006. He reviewed her medical records, prior to conducting a physical and orthopedic examination. In his report, Dr. Hudak concludes that she showed normal ranges of motion in her upper and lower extremities, dorsal, cervical and lumbosacral spine. He diagnoses her with a thoracic, lumbosacral and cervical sprains, which are all resolved. He concludes that there is no orthopedic disability, permanency or any need for further treatment.

Dr. Yerys consulted with Petronila Harrington on March 14, 2005 to discuss

having a bone scan procedure which was recommenced by her treating physician. Since Dr. Yerys did not conduct a physical examination, this report is of no significance.

#### IV. Plaintiffs' Medical Evidence in Opposition

In opposition, plaintiffs submit their affidavits, the affirmations of Dr. Luis E. Alejo, a physiatrist, Dr. Aric Hausknecht, a board certified neurologist, Dr. Steven K. Pinsky, an anesthesiologist, Dr. Alexander Weingarten, a board certified anesthesiologist, Dr. Sebastian Lattuga, a board certified orthopedic surgeon, Dr. Richard L. Parker, an orthopedic surgeon and Dr. Patricia Kelly, Dr. Mark Shapiro and Dr. Michael B. Singer, whom are radiologists.

Dr. Alejo first examined Mark Harrington on July 9, 2004, and after an inspection of his spine and the associated pain he ordered further testing including x-rays of the cervical, thoracic and lumbar spine. These x-rays revealed some degenerative changes and a straightening of the cervical lordosis. On August 11, 2004, Dr. Alejo's diagnoses was cervical and lumbar radiculopathy, with a recommendation to undergo a cervical and lumbar MRI. On August 18, 2004, Dr. Alejo concluded that the findings from the MRI's were consistent with his diagnosis of, cervical spine stenosis, C5-C6 disc herniation, disc bulges at C3-C4, C4-C5 and C6-C7 and multi-level disc bulges in the lumbar spine. Dr. Alejo then recommended that Mark Harrington see a neurologist.

Dr. Hausknecht first examined Mark Harrington on August 30, 2004. He reviewed Mark Harrington's medical files from his prior motor vehicle accident where he was diagnosed with sprain/strain of the thoracic, lumbar and cervical spine and lumbar and cervical radiculopathy. Dr. Hausknecht notes that Mark Harrington was asymptomatic before the accident of July 2004. After conducting several objective tests including range of motion tests, Dr. Hausknecht concludes that Mark Harrington sustained cervical and lumbosacral derangement with disc herniations at C3-C4, C4-C5, C6-C7 and disc bulges at L3-L4 and L4-L5 as well as an exacerbation of asymptomatic degenerative joint disease. At numerous follow-up examinations, the most recent on November 27, 2006, Dr. Hausknecht conducted objective tests which still indicated restrictions in Mark Harrington's range of motion. He concluded that the injuries are permanent in nature and are causally related to the subject accident.

Dr. Pinsky examined Mark Harrington on November 16, 2004 and found diminished deep tendon reflexes. His impression was intervertebral disc disorder and radiculopathy.

Dr. Weingarten first examined Mark Harrington on February 10, 2005 and he recommended a series of epidural shots, physical therapy and medication to manage his neck and back pain. Dr. Weingarten's diagnoses was cervical and lumbar radiculopathy. In response to the diagnosis, Mark Harrington underwent three sets of lumbar and cervical epidermal injections over the next year. On February 9, 2007, Dr. Weingarten reaffirmed his previous diagnosis of cervical and lumbar radiculopathy and suggested spinal surgery or further epidural injections. Dr. Weingarten concludes that Mark Harrington's injuries will severely limit his daily activities, are permanent in nature and are causally related to the subject accident.

Dr. Lattuga first examined Mark Harrington on February 8, 2007. He conducted range of motion tests where he found significant restrictions in his cervical spine, flexion decreased from 90 degrees to 45 degrees, extension decreased from 70 degrees to 35 degrees and left and right turning decreased from 80 degrees to 40 degrees. Thoracolumbar flexion decreased from 90 degrees to 45 degrees, extension decreased from 40 degrees to 20 degrees and left and right turning decreased from 60 degrees to 30 degrees. Dr. Lattuga also performed x-rays which showed a collapse of the disc space at C5-C6, C6-C7, L3-L4 and L4-L5 with spondylolisthesis at L3-L4. He concluded that Mark Harrington suffered a cervical and lumbar sprain, radiculopathy, herniated discs and stenosis. On February 19, 2007, Dr. Lattuga re-evaluated Mark Harrington where he reviewed his updated MRI's of the cervical and lumbar spine which showed straightening of the cervical lordosis, disc herniations at C5-C6, L3-L4 and L4-L5. Dr. Lattuga concluded that his injuries are permanent, causally related to the subject accident and will result in a significant limitation of his cervical and lumbar spine.

As discussed above, Dr. Kelly reviewed Mark Harrington's lumbosacral and cervical MRI's dated August 14 and 16, 2004. She found, *inter alia*, bulges at L3-L4, L4-L5, C3-C4, C4-C5, C6-C7 and a disc herniation at C5-C6. Dr. Shapiro reviewed Mark Harrington's updated lumbar and cervical MRI's dated February 14, 2007. His impressions were straightening of the cervical lordosis and disc herniations at C5-C6, L3-L4 and L4-L5.

Dr. Alejo first examined Petronila Harrington on July 13, 2004, where he conducted physical therapy until April 29, 2005. After a physical examination

which included range of motion tests, Dr. Alejo's diagnoses was a cervical, lumbar and thoracic sprain. He recommended she undergo a baseline x-ray. On August 18, 2004, Dr. Alejo reviewed the findings from her x-rays and diagnosed Petronila Harrington with cervical and lumbar radiculopathy. Dr. Alejo then recommended that she undergo MRI's and an x-ray of her right shoulder. On September 21, 2004 he reviewed her MRI's which showed a disc herniation at C4-C5 and disc bulges at L3-L4 and L4-L5. He concluded that she sustained a permanent injury which would result in a significant limitation of her lumbar and cervical spine. He also found that the injury was causally related to the subject accident.

Dr. Parker examined Petronila Harrington on December 1, 2004 in regard to her right wrist. He conducted a physical examination which included range of motion tests. He found restrictions in her wrist, dorsiflexion was reduced from 70 degrees to 20 degrees, palmar flexion was reduced from 90 degrees to 20 degrees, radial deviation was reduced from 20-30 degrees to 10 degrees and ulnar deviation was reduced from 50 degrees to 10 degrees. His diagnosis was a right wrist sprain/strain which was causally related to the subject accident. He provided her with a wrist immobilizer and a prescription for her pain.

Dr. Kelly reviewed Petronila Harrington's lumbosacral MRI dated September 17, 2004. She found, *inter alia*, mild bulges at L3-L4 and L4-L5. Dr. Singer reviewed her cervical MRI dated September 13, 2004. His impression was a disc herniations at C4-C5.

Dr. Hausknecht first examined Petronila Harrington on November 15, 2004, where he reviewed her MRI's and conducted a neurological examination. He diagnosed her with a cervical and lumbar derangement with C4-C5 disc herniation and L3-L4 and L4-L5 disc bulges. Dr. Hausknecht concluded that she was totally disabled as a result of the subject accident. He directed her to continue rehabilitation and to restrict her activities. On April 30, 2007, Dr. Hausknecht conducted a follow-up examinations where he conducted a physical examination in addition to range of motion tests. The tests indicated restrictions in her ranges of motion. He concluded that the injuries are permanent in nature and are causally related to the subject accident.

With regard to her "90/180" claim, Petronila Harrington submits credible medical evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in her daily activities. Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, *supra*. However, her recent medical submission from Dr. Hausknecht, which attempts to establish, *inter alia*, a "permanent consequential limitation of use of a body function or system" is devoid of any detail as to what objective tests, if any, he employed in making his

diagnosis and that her limitations were significant. Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra; Milazzo v Gesner, supra; Vasquez v Reluzco, supra.

Additionally, according to her own proof, she never sought any treatment after April 2005, except for her re-evaluation by Dr. Hausknecht on April 30, 2007, which was in response to this motion. This gap or complete cessation of treatment further undermines Petronila Harrington's other claims of serious injury under Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Milazzo v Gesner, supra; Berete v Ford Motor Credit Co., 29 AD3d 452 (1<sup>st</sup> Dept. 2006); Rubenscaastro v Alfaro, 29 AD3d 436 (1<sup>st</sup> Dept. 2006); Vasquez v Reluzco, supra; Perez v Rodriguez, 25 AD3d 506 (1<sup>st</sup> Dept. 2006); Baez v Rahamatali, 24 AD3d 256 (1<sup>st</sup> Dept. 2005); Agramonte v Marvin, 22 AD3d 322 (1<sup>st</sup> Dept. 2005).

#### V. Plaintiffs' Motion for Summary Judgment on Liability

It is well settled that "the driver of a motor vehicle must maintain a safe distance between his vehicle and the one in front of him, and that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver who strikes the vehicle in front (Johnson v Phillips, 261 AD2d 269, 271 [1999]), unless the operator of the rear vehicle can come forth with an adequate, non-negligent explanation for such accident (Grimes-Carrion v Carroll, 13 AD3d 125, 136 [2004])." Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 (1st Dept. 2005); see Francisco v Schoepfer, 30 AD3d 275 (1<sup>st</sup> Dept. 2006).

Here, in support of their motion, the plaintiffs proffer the pleadings in this matter, and the parties deposition testimony, which establishes that they were stopped in order to yield the right-of-way in a merge lane when they were struck in the rear by defendants' vehicle. By this evidence, the plaintiffs have established defendants' liability for the accident. In response, the defendants have failed to come forward with any non-negligent explanation for the accident. The defendants' conclusory allegation that plaintiffs' may have "suddenly stopped" is insufficient to create an issue of fact. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to meet the requirement to tender evidence in admissible form. Zuckerman v City of New York, supra at 562; see Cilli v Resjefal Corp., 16 AD3d 339 (1<sup>st</sup> Dept. 2005); Garcia v Verizon New York, Inc., 10 AD3d 339 (1<sup>st</sup> Dept. 2004).

#### VI. Conclusion

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment dismissing Mark Harrington's complaint on the ground that he did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is denied; and it is further,

ORDERED that the defendants' motion for summary judgment dismissing Petronila Harrington's complaint on the ground that she did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted to the extent that her claims are dismissed except for her "90/180" claim; and it is further, and it is further,

ORDERED that the plaintiffs' motion for summary judgment on the issue of liability is granted; and it is further,

ORDERED that the matter be set down for a trial on the issue of damages, and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties, the County Clerk, and the Clerk of the Trial Support Office within 45 days of entry.

This constitutes the Decision and Order of the Court.

Dated: November 28, 2007

*Deborah A. Kaplan*

Deborah A. Kaplan, N.Y.C.

**DEBORAH A. KAPLAN**  
NON-FINAL DISPOSITION

**FILED**  
DEC 10 2007  
NEW YORK  
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