

**Powell v Monsato**

2008 NY Slip Op 30647(U)

February 25, 2008

Supreme Court, Richmond County

Docket Number: 0101072/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.:101072/2006  
Motion No.:003/004**

**MONTY POWELL,**

*Plaintiff*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**CORALIA MONSATO,  
MAXIMILION BREWER, and  
GREEN LINE BUS SERVICES.**

*Defendants*

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The following items were considered in the review of this motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Order to Show Cause	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Defendants motions for an order dismissing plaintiff's complaint pursuant to CPLR § 3212 on the grounds that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) are denied in their entirety.

**Facts**

This action arises out of a motor vehicle accident that occurred on July 21, 2005. On that day plaintiff was a passenger in a bus that was struck by co-defendant's vehicle on Hillsdale Avenue, at or near the intersection of 148<sup>th</sup> Street, County of Queens, City and State of New York. In his deposition plaintiff testified that he was a passenger in the bus at the time of the accident. At the time of the accident plaintiff testified to the following:

Q. Were you seated behind the driver or on the other side of the bus?

A. On the other side.

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Q. Were you seated near the front, middle or back of the bus?

A. Front of the bus.

Q. Were you seated in the first seat closer to the window or the second seat?

A. The first seat.<sup>1</sup>

Plaintiff further testified to the following facts regarding the moment of impact:

Q. What part of your body struck the interior of the bus?

A. My hip hit the front.

Q. Your right hip?

A. Yes.

Q. Hit the seat in front of you?

A. Hit the bar by the window. There is a bar there.

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Q. Any other parts of your body strike the interior of your bus aside from your hip?

A. My head.

Q. That would be the right side of your head?

A. Yes.

Q. What did that strike?

A. The windshield.

Q. You mean the window?

A. The window.<sup>2</sup>

Plaintiff testified that after the accident he neither lost consciousness, nor was he bleeding. He averred that an ambulance removed him from the scene on a backboard. He was then taken to Jamaica Hospital where he was X-rayed, given a foam neck brace and arm sling and released. Plaintiff was never admitted to the hospital, but was instead treated in the Emergency Room. Plaintiff was unemployed at the time of the accident. Plaintiff's Verified Bill of Particulars allege that he sustained the following permanent injuries as a result of the accident:

a. C3-4 Disc herniation extending into the left lateral recess.

(Confirmed by MRI)

b. C5-6 Disc herniation protruding 4-5 millimeters and impinging upon the anterior margin of the cervical cord 6-7 millimeters across its base. (Confirmed by MRI)

c. Cervical sprain and strain and displacement.

d. Right shoulder contusion and derangement with impingement on the anterior superior dome of the rotator cuff with tendinosis of the

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<sup>1</sup> Powell Transcript at 8.

<sup>2</sup> Powell Transcript at 14 and 15.

subcapularis tendon. (Confirmed by MRI)

As a result of these injuries plaintiff testified to the following:

Q. What problems, if any, did you have with the use of your arm or shoulder immediately after the accident?

A. I couldn't use it.

Q. When you say you couldn't use it, what do you mean?

A. I could not lift things.

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Q. Could you raise your right arm over your head?

A. No.

Q. Could you raise your right arm at all?

A. Not as much as I could before.

Q. Did that condition improve with your right shoulder or is it the same today?

A. It is an improvement then before.

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Q. What can't you do now because of your shoulder that you could do before the accident?

A. I used to play with my brother. Play and throw the ball with my brother and hang out with the kids in the neighborhood. I had a relationship with the kids in the neighborhood that I played with. I did things with them. I can't do those things. If I go shopping, I can't lift the bags for my mother or for my friends. I have to pay some kid to help.

Q. What is it that you can't do because of the condition in your neck?

A. I can't drive a truck for a long period of time, sitting up, without having to stop for breaks, trying to like work it out.<sup>3</sup>

Seven days after the accident, Dr. John McGee, an osteopath, evaluated the plaintiff and produced a report.

Defendants now move this court to dismiss plaintiff's complaint on the ground that plaintiff failed to demonstrate a "serious injury" as defined by Insurance Law § 5102(d). In support of their motion defendants rely on the affirmed statements of Dr. Michael J. Carciente, a neurologist; Dr. Audrey Eisenstadt, a radiologist; and Dr. Andrew B. Weiss, an orthopedic surgeon.

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<sup>3</sup> Powell Transcript at 55 and 56.

In response, the plaintiff offers the sworn statements of Dr. Andrew C. Susi, a chiropractor; Dr. John McGee, an osteopath; Dr. Dennis R. Rossi, a radiologist; Dr. Roman Tabakman, a medical doctor without an identifiable speciality; Dr. Aric Hausknecht who is board certified in Psychiatry and Neurology; and Dr. Autumn Cutler, a chiropractor.

### **Discussion**

Defendants seek summary judgment on the ground that the plaintiff has not sustained a “serious injury” as defined in Insurance Law §5102(d).<sup>4</sup> The serious injury threshold set forth in Insurance Law §5104(a) can only be established under these categories.<sup>5</sup> Thus, the mere fact that one has been injured, even seriously, does not establish that a “serious injury” has been sustained.<sup>6</sup> Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease,<sup>7</sup> that results in one of the nine serious injury threshold categories.<sup>8</sup>

It is important to keep in mind the policies underlying the enactment of the No-Fault Law and the law’s structure when litigating no-fault related issues. Courts have consistently held that the No-Fault Law must be interpreted to fulfill the policies the legislature had in mind.<sup>9</sup> It is for

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<sup>4</sup> A serious injury must be a personal injury, “[W]hich 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 constitutes 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” (Insurance Law §5102 [d]).

<sup>5</sup> *Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].

<sup>6</sup> *Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff’d* 63 NY2d 645 [1984].

<sup>7</sup> 11 NYCRR §65-2.1[e]

<sup>8</sup> *See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].

<sup>9</sup> *See, Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].

the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of “serious injury.”<sup>10</sup>

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim.

In the case before this court defendant came forward with reports from independent medical exams. Defendant presented the sworn testimony of Dr. Michael J. Carciente, a neurologist; Dr. Audrey Eisenstadt, a radiologist; and Dr. Andrew B. Weiss, an orthopedic surgeon. All three doctors proffered evidence that indicates that plaintiff is not injured within the statutory definition.

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.<sup>11</sup> The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.<sup>12</sup> The plaintiff in such a situation must present objective evidence of the injury.

In order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law §5102 (d), the plaintiff's expert must submit **quantitative objective findings** in addition to an opinion as to the significance of the injury.<sup>13</sup> Plaintiff submits various items of proof in an attempt to meet his burden.

Plaintiff alleges injuries that are consistent with a permanent consequential limitation of the use of his right arm and cervical spine. This category of injury involves any “limitation” of use which is more than “minor, mild or slight,” as contrasted to the loss-of-use category which

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<sup>10</sup> See, e.g., *Licari v. Elliott*, 57 NY2d 230, 237.

<sup>11</sup> See, *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

<sup>12</sup> See, *Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2<sup>nd</sup> Dept 2000]

<sup>13</sup> *Grossman v. Wright* 268 AD2d 79 [2<sup>nd</sup> Dept 2000].

requires proof of a “total loss” of use.<sup>14</sup> There are, however, differences between them. The “consequential limitation of use” category requires that the limitation be permanent, whereas the “significant limitation of use” category does not require that the limitation be permanent.<sup>15</sup> Furthermore, the “consequential limitation of use” must be with respect to a body organ or member, whereas the “significant limitation of use” must be with respect to a body function or system.

A designation set forth by medical proof of a numeric percentage or degree of a plaintiff’s loss of range of motion can be used to establish a limitation of use.<sup>16</sup> An unspecified percentage or degree of restricted range of motion is not enough.<sup>17</sup>

Alternatively, medical proof of a functional impairment not involving a loss of range of motion can suffice. This will involve a medical expert’s qualitative assessment of the plaintiff’s condition which will compare the plaintiff’s impairment or limitation to the normal function, purpose and use of the affected body organ, member, function or system.<sup>18</sup>

Where it is claimed that the limitation of use is “consequential” or “significant,” which terms are synonymous, it is required that there must be proof that the limitation is more than a “minor, mild or slight” limitation of use.<sup>19</sup> It must be “important” or “meaningful.”

This requirement relates to the medical significance of the claimed limitation of use. The

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<sup>14</sup> See, *Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295 [2001]; *Gaddy v. Eyler*, 79 NY2d 955 [1992].

<sup>15</sup> See, *Lopez v. Senatore*, 65 NY2d 1017 [1985]; *Lanuto v. Constantine*, 192 AD2d 989 [3<sup>rd</sup> Dept 1993]; *Decker v. Rassaert*, 131 AD2d 626 [2<sup>nd</sup> Dept 1987].

<sup>16</sup> *Toure v. Avis Rent a Car Systems*, 98 NY2d 345 [2002]; *Molina v. Nosa Choi*, 298 AD2d 508 [2<sup>nd</sup> Dept 2002].

<sup>17</sup> See, *Herman v. Church*, 276 AD2d 471 [2<sup>nd</sup> Dept 2000]; *Barbarulo v. Allery*, 271 AD2d 897 [3<sup>rd</sup> Dept 2000]; *Owens v. Nolan*, 269 AD2d 794 [4<sup>th</sup> Dept 2000].

<sup>18</sup> *Toure v. Avis Rent A Car Systems*, *supra*; *Dutel v. Green*, 84 NY2d 795 [1985]; *June v. Gonet*, 298 AD 2d 811, [3<sup>rd</sup> Dept 2002].

<sup>19</sup> See, *Toure v. Avis Rent A Car*, *supra*; *Gaddy v. Eyler*, *supra*; *Nolan v. Ford*, 64 NY2d 681 [1984]; *Licari v. Elliott*, 57 NY2d 230, 235 [1982].

analysis involves a comparative determination of the degree or qualitative nature of the limitation based on the normal function, purpose and use of the affected body part.<sup>20</sup> In other words, a medical expert must describe the qualitative nature of plaintiff's limitation based on the normal function, purpose or use of plaintiff's affected body part.<sup>21</sup>

As to the causation element, it will be necessary for the plaintiff to establish this element by expert opinion, namely, that the specified degree or percentage of loss of range of motion or limitations in plaintiff's physical activities are a natural and expected medical consequence of plaintiff's injuries, which injuries are demonstrated by competent medical proof.<sup>22</sup>

First, plaintiff submits the affidavit of Dr. Susi, a chiropractor, sworn to on November 12, 2007. Dr. Susi first treated plaintiff on July 26, 2005, five days after the accident on which this action is based. Dr. Susi avers that he treated plaintiff for one month. This is a fact that is in direct contravention with plaintiff's testimony. In his deposition, plaintiff stated:

Q. So you saw Dr. Susi three times a week for two or three months?  
A. Yes.<sup>23</sup>

Even assuming that plaintiff's testimony did not directly contradict Dr. Susi's sworn statements, Dr. Susi's affidavit is suspect for another reason. Substantial delays between cessation of plaintiff's medical treatments post-accident and an expert examination must be explained.<sup>24</sup> Over two years elapsed between the end of plaintiff's treatment in approximately August 2005 and his reevaluation in November 2007.

Dr. Susi's affidavit does not even attempt to give any reason for this gap in treatment. In *Pommells v. Perez*, the Appellate Division, First Department upheld a trial court's summary judgment decision where plaintiff "... fail[ed] to explain a nearly four-year gap in treatment."

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<sup>20</sup> See, *Route v. Avis Rent A Car System*, 98 NY2d at 353, *supra*.

<sup>21</sup> *Id.* at 355.

<sup>22</sup> See, *Toure v. Avis Rent A Car System*, 98 NY2d at 353, 355, *supra*.

<sup>23</sup> Powell Transcript at 24.

<sup>24</sup> *Grossman*, 268 AD2d at 84.

The Appellate Division, reasoned that this gap “. . . renders any conclusion as to causation speculative.”<sup>25</sup> This holding was subsequently affirmed by the Court of Appeals.

In the case before the court, plaintiff began treatment with Dr. Susi approximately a five days after the incident in question in July 2005. Plaintiff testifies that he continued treatment with, Dr. Autumn Cutler, a chiropractor at Midtown Medical Associates after he moved to Staten Island. However, plaintiff’s statement is not substantiated in Dr. Cutler’s affidavit sworn to on December 19, 2007. In addition, Dr. Susi, first saw plaintiff in July 2005, yet did not produce a report until November 2007. The medical proof offered by plaintiff must be based upon an examination that was conducted close to the time the opinion is rendered.<sup>26</sup> In this case, the doctor’s opinion was rendered over two years from the examination. In addition, the medical report provided by Dr. Rossi, a radiologist concerning the MRI of plaintiff’s Cervical Spine and the Right Shoulder taken on August 30, 2005 was not reported until July 13, 2006—nearly one year after conducting the examination. The same is true for the physical examination conducted by Dr. Tabakman on September 16, 2005. Dr. Tabakman’s report was not affirmed until December 14, 2007 over two years after the his initial examination of plaintiff. Dr. Tabakman waited until the plaintiff sought a reevaluation on December 7, 2007 to render his initial report. In addition, Dr. Tabakman’s failed to draft a report for a prior reevaluation on August 31, 2007 until his December 14, 2007 report. In any event, Dr. Tabakman’s report does not present this court with any objective evidence by which it can substantiate the claims made by plaintiff.

The gap between the examination of plaintiff and the preparation of the reports is too substantial for these documents to be submitted in support of plaintiff’s position that he sustained a “serious injury.”

However, the report of Dr. John McGee, an osteopath met the plaintiff’s burden to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he

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<sup>25</sup> 4 AD2d 101, [1<sup>st</sup> Dep’t. 2004]

<sup>26</sup> *See, Grossman v. Wright*, 268 AD2d 79 [2d Dep’t 2000]; *Yamin v. Broughman Bus Transp. Co.*, 633 NYS2d 78 [2d Dep’t 1995].

or she suffered a serious injury.<sup>27</sup> Dr. McGee prepared his report on July 28, 2005, just seven days after the accident. His report substantiates plaintiff's claims in his Verified Bill of Particulars with objective evidence.

In addition plaintiff offered the reports of Dr. Hausknecht, who is board certified in Psychiatry and Neurology. Dr. Hausknecht evaluated plaintiff on January 9, 2007 and submitted an affirmed report to the court on January 10, 2008. His report sets forth objective proof by which plaintiff's alleged injuries may be substantiated. Furthermore, the affidavit of Dr. Cutler, a chiropractor, setting forth objective findings from plaintiff's range of motion test on December 7, 2007 is sufficient objective proof to substantiate the injuries alleged by plaintiff.

Both reports demonstrate a significant loss of plaintiff's range of motion with regard to the areas alleged to have been injured. When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims.<sup>28</sup>

### **Conclusion**

Defendants motions for summary judgment are denied. A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."<sup>29</sup> Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."<sup>30</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable

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<sup>27</sup> *See, Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2<sup>nd</sup> Dept 2000]

<sup>28</sup> *Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002].

<sup>29</sup> CPLR §3212[b].

<sup>30</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2<sup>nd</sup> Dept 1990].

issue or where the existence of an issue is arguable.<sup>31</sup> Here there is an issue of fact as to whether or not the plaintiff has suffered a “serious injury” as defined in Insurance Law §5102(d).

Accordingly, it is hereby:

ORDERED, that defendants motions for summary judgment are denied; and it is further

ORDERED, that the parties appear for a further conference at DCM Part 3 on April 14, 2008 at 9:30 A.M.

ENTER,

DATED: February 25, 2008

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Joseph J. Maltese  
Justice of the Supreme Court

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<sup>31</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1<sup>st</sup> Dept 1994].