

**Mulvey v Dean**

2008 NY Slip Op 30843(U)

March 10, 2008

Supreme Court, Suffolk County

Docket Number: 0024190/2006

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 43 - SUFFOLK COUNTY

**PRESENT:**

Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

MOTION DATE 10-31-07 (002 & 005)

MOTION DATE 11-1-07 (003)

MOTION DATE 12-20-07 (004)

ADJ. DATE 2-7-08

Mot. Seq. # 002 - MD; #003 - XMD;  
004 - XMD; # 005 - XMD;

-----X  
 CAROLYN I. MULVEY, :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 ROBERT M. DEAN, JR., ROBERT M. DEAN, :  
 WALTER JAMES MULVEY III and CHRISTINE :  
 MULVEY. :  
 Defendants. :  
 -----X

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Upon the following papers numbered 1 to 28 read on this motion and these cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3; Notices of Cross Motion and supporting papers 4 - 6; 7 - 9; 10 - 12; Answering Affidavits and supporting papers 13 - 14; 15 - 16; 17 - 18; 19 - 20; Replying Affidavits and supporting papers 21 - 22; 23 - 24; 25 - 26; 27 - 28; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (#002) by defendants Mulvey for summary judgment and the cross motion (#003) by defendants Dean for summary judgment dismissing the plaintiff's complaint on the grounds that none of the injuries which the plaintiff allegedly sustained or exacerbated in the underlying motor vehicle accident constitute a serious injury as that term is defined in §5102(d) of the Insurance Law are considered thereunder and under CPLR 3212 and are denied; and it is further

**ORDERED** that the cross motion(#004) by the plaintiff for partial summary on the issue of the defendants' liability in this action is considered under CPLR 3212 and the relevant provisions of the Vehicle and Traffic Law and is denied, as is the cross motion (#005) by the Mulvey defendants for summary judgment dismissing all claims of liability interposed against them; and it is further

**ORDERED** that pursuant to CPLR 3212 (g), the court declares that the issue of the plaintiff's freedom from engagement in acts of culpable conduct is hereby established for all purposes in this action and all defendants are precluded from raising the issue of the plaintiff's comparative negligence by the introduction of evidence at the trial of this action or otherwise, as all affirmative defenses based on the plaintiff's comparative negligence are dismissed.

Plaintiff commenced this action to recover damages for the personal injuries she sustained on July 18, 2005 while riding as a front seat passenger in a car owned and/or operated by defendants Mulvey. At the time of the accident it was raining lightly or misting and the road was wet. Just prior to the collision, the Mulvey vehicle turned into a residential driveway so as to change its travel direction by 180 degrees on Moore's Hill Road in Laurel Hollow, New York. The Dean vehicle was approaching the Mulvey vehicle and, after negotiating a curve in the roadway, the right, front, passenger side of the Dean vehicle came into contact with the trunk of the Mulvey vehicle. There is conflicting testimony with respect to the position of the Mulvey vehicle at the time of impact. Defendant Robert M. Dean, Jr. testified that the Mulvey vehicle was perpendicular to Dean's lane of travel at the time of impact while defendant Walter James Mulvey, III testified that he had completed his turn around and was proceeding forward when his vehicle was struck from behind by the Dean vehicle.

As a result of the collision, the plaintiff sustained head trauma and was taken from the scene in an unconscious state. She was treated at the emergency room of a local hospital and released without admission. By her complaint and verified bill of particulars, the plaintiff claims to have suffered and/or to have aggravated, accelerated or exacerbated the following injuries or conditions: temporomandibular joint disorder; myofascial pain disorder; right temporomandibular joint derangement; loss of consciousness; headaches; constant jaw pain/clicking; swelling, neck and shoulder pain; chronic right ear pain/tinnitus; difficulty closing teeth; inability to open mouth; extreme tenderness to touch right side of jaw; inability to chew; loss of mobility; limited range of mandibular movement; pain right focal region of jaw; limited range of cervical motion; difficulty sleeping and weight loss; head contusion; possible need for surgery for temporomandibular joint disorder; and loss of enjoyment of life. Within a few days of the accident, the plaintiff returned to her home state of Virginia and was treated by her family doctor for pain to her head, neck and shoulders; constant jaw popping and clicking and an inability to extend or open her jaw without pain and discomfort. She then treated with her dentist who fitted the plaintiff with a dental bite apparatus and referred her to a physical therapist. Although the plaintiff's physical therapy sessions ended in June 2006, the plaintiff alleges that she still experiences, *inter alia*, jaw popping clicking, jaw pain, an inability to open her mouth, difficulty eating various foods all of which necessitates her use of the dental bite apparatus earlier prescribed and fitted by her dentist.

By the instant motion-in-chief (#002) and cross motion (#003), the Mulvey and Dean defendants demand an award of summary judgment dismissing the plaintiff's complaint on the grounds that none of the injuries claimed by the plaintiff to have been sustained in the subject accident constitute an actionable serious injury within the purview of §5102(d) of the Insurance Law. In support of these applications, the defendants submit and/or rely upon the pleadings, the verified bill of particulars served in response to the defendants' separate demands: the plaintiff's deposition testimony and the reports of the dentist, orthopedist and neurologist whom the defendants jointly retained to examine the plaintiff. The defendants contend that such submissions establish, *prima facie*, that none of the injuries which the plaintiff claims to have sustained in the

subject accident is actionable under §5102(d) of the Insurance Law. However, review of the defendants' submissions reveal that genuine questions of fact regarding the threshold issue of serious injury were not eliminated by the proof submitted by the defendants.

It is well established that the court must determine in the first instance whether a prima facie showing of serious injury as defined in §5102(d) of the Insurance Law has been established (*see, Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [1991]). On a motion for summary judgment dismissing the plaintiff's complaint pursuant to §5102(d) of the Insurance Law, the initial burden is on the defendant to present evidence, in competent form, showing that no injury constituting a serious injury was sustained by the plaintiff in the subject accident (*see, Forlong v Faulton*, 29 AD3d 856, 814 NYS2d 530 [2006]).

A defendant fails to meet his or her burden of proof on a motion for summary judgment dismissing the plaintiff's complaint for want of a serious injury where, *inter alia*, the defendant relies upon the reports of one or more examining physicians who: 1) observed limitations or restrictions in a part of the body which the plaintiff claims to have sustained a permanent injury and such limitations or restrictions are not sufficiently quantified and/or objectively established to be mild, minor or slight (*see, Doherty v Galla*, 46 AD3d 610, 848 NYS2d 269 [2007]; *Paradizov v Doan*, 46 AD3d 787, 848 NYS2d 303 [2007]; *Whittaker v Webster Trucking Corp.*, 33 AD3d 613, 823 NYS2d 95 [2006]); or 2) failed to address a specific injury or category of serious injury that has been alleged in the plaintiff's complaint and/or bill of particulars to have been sustained in the accident (*see, O'Neal v Bronopolsky*, 41 AD3d 452, 835 NYS2d 910 [2007]; *Gerson v C.L.S. Transportation, Inc.*, 37 AD3d 530, 829 NYS2d 688 [2007]; *Villavicencio v Miele*, 7 AD3d 776 NYS2d 82 [2004]); or 3) failed to provide an objective basis for an asserted medical opinion that the cause of any observed limitation or restriction is unrelated to the subject motor vehicle accident (*see, Abbadessa v Rogers*, 40 AD3d 665, 836 NYS2d 633 [2007]; *Bozza v O'Neill*, 43 AD3d 1094, 842 NYS2d 88 [2007]; *Gentile v Snook*, 20 Ad3d 389, 799 NYS2d 230 [2005]).

Here, the April 12, 2007 examination of the plaintiff's jaw by the defendants' dentist revealed a deviation on opening and closing and a crepitus on opening and closing the right and left TMJ. However, the dentist did not assign a quantitative percentage or qualitative assessment of the degree of the observed limitation or crepitus condition and he offered no opinion as to causation of said limitation and crepitus condition. The defendants' orthopedist also noted the existence, palpably, of a crepitant sensation with active opening and closing of both of the plaintiff's TMJ joints in his April 12, 2007 examination of the plaintiff. He further noted that the plaintiff was suffering from TMJ injury by history, which history included his review, *inter alia*, of the records of the plaintiff's treating dentist following the accident. The defendants' neurologist deferred any opinions with respect to the plaintiff's TMJ dysfunction to "dental consultants". None of the defendants' dental or medical examiners addressed the plaintiff's pleaded claims of chronic ear pain and tinnitis.

Upon review of the defendants' submissions, the court finds that the same were insufficient to establish, prima facie, that the plaintiff did not sustain an actionable serious injury in the subject accident. The limitation in the plaintiff's jaw and the crepitus condition which the defendants' examining dentist and orthopedist observed and which the plaintiff alleges to have been caused, aggravated, accelerated or

exacerbated by the subject accident, cannot be considered mild, minor or slight as the defendants' dentist and orthopedist failed to assign a quantitative percentage or qualitative assessment of the degree of the limitation and/or crepitus condition they observed in their examinations of the plaintiff's jaw (*see, Doherty v Galla*, 46 AD3d 610, 848 NYS2d 269 [2007], *supra*; *Paradizov v Doan*, 46 AD3d 787, 848 NYS2d 303 [2007], *supra*; *Whittaker v Webster Trucking Corp.*, 33 AD3d 613, 823 NYS2d 95 [2006], *supra*; *Kelly v Rehfeld*, 26 AD3d 469, 809 NYS2d 581 [2006]). Moreover, the failure of the defendants' medical and dental examiners to examine and address the plaintiff's pleaded claims of tinnitus and other chronic conditions of the plaintiff's right ear warrant a finding that the defendants failed to sustain their initial burdens on the instant applications (*see, O'Neal v Bronopolsky*, 41 AD3d 452, 835 NYS2d 910 [2007]; *Gerson v C.L.S. Transportation, Inc.*, *supra*). Under these circumstances, it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact on that matter (*see, Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2004]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2001]). Therefore, the motion (#002) and cross motion (#003) by the defendants for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury as defined in Insurance Law §5102 (d) are denied.

Left for determination by the court is the cross-motion (#005) by the Mulvey defendants for summary judgment dismissing all liability claims interposed in this action against them and the cross motion (#004) by the plaintiff for partial summary judgment on the issue of each defendants' liability for the occurrence of the subject accident. In support of their cross motion for summary judgment, the Mulvey defendants rely upon the rules imposing liability to trailing vehicles whose drivers fail to provide a non-negligent excuse for colliding into the back of a vehicle that is lawfully stopped or in the process of a lawful stop at the time of the collision (*see, e.g., Marietta v Scelzo*, 29 AD3d 539, 815 NYS2d 137 [2006]; *David v New York City Board of Education*, 19 AD3d 639, 797 NYS2d 294 [2005]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]; *Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [1989]; *Silberman v Surrey Cadillac Limousine Service, Inc.*, 109 AD2d 833, 486 NYS2d 357 [1985]). Both the Dean defendants and the plaintiff oppose the Mulvey defendants' cross motion upon allegations that issues of fact exist regarding whether defendant Walter James Mulvey, III was negligent in the manner in which he operated the Mulvey vehicle at the time of the collision and that summary judgment in favor of the Mulvey defendants is precluded by the existence of these questions of fact.

The backing of a motor vehicle is prohibited by §1211 of the Vehicle and Traffic Law unless such movement may be made with reasonable safety and without interfering with other traffic (*see, Pena v Santana*, 5 AD3d 649, 774 NYS2d 744 [2004]). The conflicting versions of the material facts surrounding the occurrence of the accident, such as the position of the Mulvey vehicle at the time of impact and whether the conduct of Walter James Mulvey, III in backing out of the residential driveway in which he turned to effect a turn around of his vehicle was negligent under the circumstances, present genuine issues of fact, including those of credibility, which the trier of fact must determine (*see, Flood v New York City Transit Authority*, 6 AD3d 655, 775 NYS2d 557 [2004]; *see also Broughton v Dery*, 56 AD2d 906, 392 NYS2d 693 [1977]; *White v Leary* 7 AD2d 807, 181 NYS2d 57 [1958]). Accordingly, the Mulvey defendants' cross motion (#005) for summary judgment dismissing all claims interposed against them in this action is denied.

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Also denied is the plaintiff's cross motion (#004) for partial summary judgment on the issue of each of the defendant's liability for the occurrence of the subject accident. The questions of fact outlined above regarding issues of comparative negligence on the part of the drivers of the vehicles involved in the subject accident preclude the granting of the plaintiff's cross motion for partial summary judgment on the issue of the defendants' liability (*see, Rios v Nicioletta*, 119 AD2d 562, 500 NYS2d 730 [1986]; *see also Morrison v Montzouotos*, 40 AD3d 717, 835 NYS2d 713 [2007]; *John v Leyba*, 38 AD3d 496, 831 NYS2d 488 [2007]; *Mundo v City of Yonkers*, 249 AD2d 522, 672 NYS2d 128 [1998]; *Cf., Silberman v Surrey Cadillac Limousine Service, supra*).

Although the existence of questions of fact regarding comparative negligence on the part of the drivers of the vehicles involved in the subject accident precludes the granting of the plaintiff's motion for partial summary judgment on the issue of the defendants' liability, the record adduced on the instant motion clearly established the absence of negligence on the part of the plaintiff. Although the Dean defendants claim that the plaintiff, a mere front seat passenger in the vehicle operated by defendant Walter James Mulvey, III, was negligent in that she failed to exercise reasonable care for her own safety and that such negligence caused or contributed to the occurrence of the accident, such claim is rejected as unmeritorious. While it has long been recognized that a passenger must use reasonable care for his or own safety, reasonable care means that degree of care which a reasonably prudent person would use under the same circumstances (*Nelson v Nygren*, 259 NY 71, 181 NE 52 [1932]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]).

Here, the record is devoid of any evidence tending to establish that the plaintiff acted unreasonably under the circumstances and that she breached a duty of care owing to herself, to the driver of her vehicle or to anyone else (*see, Luck v Tellier*, 222 AD2d 783, 634 NYS2d 814 [1995]; *Knorr v City of Albany*, 68 AD2d 982, 414 NYS2d 819 [1979]; *Altire v 2061 Bryant Ave. Corporation*, 256 AD 1004, 10 NYS2d 901 [1939] *Cf., Possner v Hendler*, 302 AD2d 509, 755 NYS2d 255 [2003]). Accordingly, the court declares, pursuant to CPLR 3212 (g), that the issue of the plaintiff's freedom from engagement in acts of culpable conduct is hereby established for all purposes in this action. All affirmative defenses based on the plaintiff's comparative negligence are dismissed and all defendants are precluded from raising the issue of the plaintiff's comparative negligence by the introduction of evidence at the trial of this action or otherwise.

Dated: March 10, 2008

  
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 J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION