SUPREME COURT OF THE STATE OF NEW YORK **Index No. 101640/05**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 002 & 003**

ESTHER PRINCE,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

CARMEN NIEVES, EMERITO NIEVES, and ANNABELLE B. GARRISON

Defendant

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

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	**1,2**
Answering Affidavits	**3**
Replying Affidavits	**4,5**
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant Annabel Garrison's ("Garrison") motion for summary judgment on the grounds that the plaintiff did not sustain a "serious injury" as required by *Insurance Law* § 5102(d) is denied in its entirety. The motion of defendants Carmen and Emerito Nieves ("the Nieves") for summary judgment on the issue of liability is granted in its entirety.

Facts

This action arises out of a three car collision that occurred on November 18, 2004 near the intersection of Narrows Road North with Clove Road in Staten Island, New York. Defendant Garrison testified that as she was traveling on Narrows Road North, she was merging from the left to the right lane and once in the right lane, she saw the vehicle in front of her come to a stop,

causing her to strike such vehicle.[1] The vehicle in front of Garrisson's vehicle was driven by Nieves, who subsequently rear-ended the vehicle operated by the plaintiff. The plaintiff testified that she had been at a complete stop for one or two minutes before being rear-ended by the Nieves vehicle.[2]

The plaintiff alleges that the accident caused injuries that have limited her movement permanently. As a result, she can no longer do household chores such mopping and doing the laundry.[3]

The Nieves move this court for a summary judgment order pursuant to *CPLR* § 3212, arguing that by virtue of being struck in the rear by Garrison, they are not liable as a matter of law for the plaintiff's injuries. Garrison moves for a summary judgment order pursuant to *CPLR* § 3212 and *Insurance Law* § 5102 claiming that the plaintiff does not endure a "serious injury" as it is required by the statute.

Discussion

Summary Judgment: Struck from Behind

Summary judgment, when appropriate, has the additional benefit of expediting all civil cases by eliminating from the trial calendar claims which can be properly resolved as matter of law.[4] An unfounded reluctance to employ this remedy serves only to swell trial calendars and to

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[1] Garrison transcript at 28.

[2] Prince transcript at 28.

[3] Prince transcript at 45.

[4] *Andre v. Pomeroy*, 35 NY2d 361 [1974].

deny other litigants the right to have their claims promptly adjudicated.[5]

An operator of a motor vehicle is negligent as a matter of law when, without the absence of a non-negligent explanation, his vehicle strikes another in the rear.

> It is well settled that a rear end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the moving vehicle, requiring the operator of that vehicle to come forward with a non-negligent explanation for the accident (citation omitted). Moreover, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead (see, Vehicle and Traffic Law 1129 [a]).[6]

The burden is on a party opposing summary judgment to produce evidentiary proof in admissible from sufficient to require a trial of material questions of fact on which the opposing claim rests.[7] Bald conclusory assertions, general allegations of negligence, expressions of hope or unsubstantiated allegations or assertions are all insufficient to defeat a motion for summary judgment.

Neither of the parties dispute that the Nieves vehicle was stopped at the moment of the collision. The plaintiff and Garrison suggest that Nieves followed the plaintiff too closely, however, neither introduce any evidence to support this contention. Mere speculation is not enough to raise an issue of fact. Plaintiff's complaint against the Nieves is therefore dismissed.

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[5] *Gibbons v. Hantman*, 58 AD2d 108, 395 NYS2d 482, aff'd 43 NY2d 941, 403 NYS2d 895 [1978].

[6] *Shamah v. Richmond County Ambulance Service, Inc.*, 279 AD2d 564 [2d Dept 2001].

[7] *Gilbert Frank Corp. v. Federal Insurance Co.*, 70 NY2d 966 [1988]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

Summary Judgment: Failure to Sustain a Serious Injury

Garrison seeks summary judgment on the ground that the plaintiff has not sustained a "serious injury" as defined by *Insurance Law* § 5102.[8] The serious injury threshold set forth in *Insurance Law* § 5104(a) can only be established under these categories.[9] Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained.[10] Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness, or disease,[11] that results in one of the nine serious injury threshold categories.[12]

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.[13] It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of "serious injury."[14]

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[8] 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]).

[9] *Coon v. Brown*, 192 AD2d 908 [3d Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3d Dept 1982].

[10] *Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].

[11] 11 NYCRR §65-2.1[e].

[12] *Van Norstrand v. Regina*, 212 AD2d 883 [3d Dept 1995].

[13] *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].

[14] *Licari v. Elliott*, 57 NY2d 230, 237 [1982].

A defendant can establish that a 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, Garrison came forward with the affirmed reports of Dr. Daniel Feuer, a neurologist, and Dr. Michael J. Katz, an orthopedic surgeon. After examining the plaintiff and reviewing objective tests, Dr. Katz concluded that the plaintiff's cervical strain, thoracolumbosacral strain, and bilateral shoulder contusion have been resolved. Dr. Feuer also opined that the plaintiff does not demonstrate any objective neurological disability or permanency. At this point, Garrison has sufficiently challenged the plaintiff's allegation that she sustained a serious injury.

Where defendants' 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.[15] The burden, in other words, shifts to the 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.[16] 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.[17]

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[15] *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

[16] *Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2d Dept 2000].

[17] *Grossman v. Wright* 268 AD2d 79 [2d Dept 2000].

The plaintiff alleges injuries that are consistent with a permanent consequential limitation of her 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 requires proof of a "total loss" of use.[18] 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.[19] 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.[20] An unspecified percentage or degree of restricted range of motion is not enough.[21]

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.[22]

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[18] *Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295 [2001]; *Gaddy v. Eyler*, 79 NY2d 955 [1992].

[19] *Lopez v. Senatore*, 65 NY2d 1017 [1985]; *Lanuto v. Constantine*, 192 AD2d 989 [3d Dept 1993]; *Decker v. Rassaert*, 131 AD2d 626 [2d Dept 1987].

[20] *Toure v. Avis Rent a Car Systems*, 98 NY2d 345 [2002]; *Molina v. Nosa Choi*, 298 AD2d 508 [2dDept 2002].

[21] *Herman v. Church*, 276 AD2d 471 [2d Dept 2000]; *Barbarulo v. Allery*, 271 AD2d 897 [3d Dept 2000]; *Owens v. Nolan*, 269 AD2d 794 [4th Dept 2000].

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

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.[23] It must be "important" or "meaningful."

This requirement relates to the medical significance of the claimed limitation of use. The 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.[24] In other words, a medical expert must describe the qualitative nature of the plaintiff's limitation based on the normal function, purpose, or use of the plaintiff's affected body part.[25]

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.[26]

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.[27]

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[23]*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].

[24]*Route v. Avis Rent A Car System*, 98 NY2d at 353, *supra*.

[25] *Id.* at 355.

[26]*Toure v. Avis Rent A Car System*, 98 NY2d at 353, 355, *supra*.

[27]*Toure v. Avis Rent A Car System*, 98 NY2d at 353

The plaintiff submits the affirmed statement of Dr. Jonathan Gordon, who has seen the plaintiff since April 4, 2007. His examination is based on reviews of MRI reports conducted on December 2, 2004, December 21, 2004, and December 30, 2004 by radiologist Dr. Charles De Marco. These reports objectively demonstrate that the plaintiff has a diminished range of motion with respect to her right and left shoulder as well as her cervical spine. Dr. Gordon found the straightening of cervical lordosis consistent with muscle strain and posterior disc bulges at C5-6and C6-7, cervical strain and sprain, and disc bulges in the plaintiff's thoracic spine at T11-T12 and T12-L1 levels. In addition, Dr. Gordon himself conducted a Neer test and a Hawkins impingement sign test of her right shoulder, both of which were positive. Dr. Gordon believes that the plaintiff sustained permanent injuries that were causally related to the subject accident.

Conclusion

The motion of defendants Carmen and Emerito Nieves for summary judgment pursuant to *CPLR* § 3212 is granted dismissing plaintiff's complaint and the cross-claim brought by co-defendant Annabelle B. Garrison.

The plaintiff, through the use of objective evidence, raises an issue of fact with respect to whether her injuries are permanent and meet the "serious injury" threshold as defined by statute. Defendant Annabelle G. Garrison failed to demonstrate to this court that the plaintiff did not suffer a permanent injury as a matter of law.

Accordingly, it is hereby:

ORDERED, that the motion of defendants, Carmen and Emerito Nieves, to dismiss the complaint and all cross claims pursuant to *CPLR* § 3212 on the basis that there is no material issue of fact regarding the liability of these defendants is granted in its entirety; it is further

ORDERED, that the motion of defendant Annabelle B. Garrison for summary judgment and to dismiss the plaintiff's complaint on the ground that the plaintiff did not sustain a "serious injury" is denied in its entirety; and it is further

ORDERED, that the parties appear for a final conference at **DCM Part 3** on **March 4, 2009 at 9:30 A.M.** 0

ENTER,

DATED: January 14, 2009

Joseph J. Maltese
Justice of the Supreme Court