

**Fallis v Degioia**

2010 NY Slip Op 32955(U)

October 6, 2010

Supreme Court, Queens County

Docket Number: 03703/2009

Judge: Robert J. McDonald

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Short Form Order

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - PART TT-34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T :

HON. ROBERT J. McDONALD,  
Justice

-----X		:	Index. No.: 03703 / 2009
WOL O FALLIS, MOTHER AND NATURAL		:	
GUARDIAN OF JASON FALLIS AND JOSHUA		:	
FALLIS AND WOL A FALLIS, INDIVIDUALLY,		:	
		:	Sequence No. 1
	Plaintiff,	:	
	- against -	:	Motion: 09.30.10
		:	
ERIC DEGIOIA,		:	
		:	
	Defendants.	:	Cal. 18
-----X			

The following papers numbered 1 to 8 were read on this motion by the defendant Eric Degioia (hereafter "Degioia") for an Order pursuant to CPLR 3212 for summary judgment dismissing the instant complaint upon the grounds that the plaintiffs did not sustain their burden of demonstrating "serious injury" as set forth in Insurance Law 5102 and 5104:

	<u>Papers Numbered</u>
Defendant's Notice of Motion-Affirmation-Affidavit(s)- Service-Exhibit(s)	1-4
Affirmation in Opposition - Exhibit(s)	5-7
Reply Affirmation	8

Upon the foregoing papers it is ordered that this motion is determined as follows:

The underlying action is one for serious personal injuries

allegedly sustained in a motor vehicle accident on January 26, 2009 at 192<sup>nd</sup> Street and 35<sup>th</sup> Avenue, County of Queens, New York.

The defendant Degioia claims that the plaintiffs Jason Fallis and Joshua Fallis did not sustain "serious injury".

"Serious Injury" Insurance Law §5102(d)

In order to maintain an action for personal injury in an automobile case a plaintiff must establish that he has sustained a "serious injury" which is defined as follows:

Serious injury means a personal injury which result in ... 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott*, 57 NY2d 230). Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Grossman v Wright*, 268 AD2d 79). If the defendant's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyler*, 79 NY2d 955; *Bryan v Brancato*, 213 AD2d 577).

JASON FALLIS:

The defendant Degioia submits the affirmation of Dr. Anthony Spataro, M.D., a Board Certified Orthopedic Surgeon dated March 30, 2010. The claimant, a nine year old, was a back seat passenger. This claimant's mother represents that he still complains of knee and shoulder pain. The claimant's movement was measured with a goniometer. Dr. Spataro found that there was no restriction of movement with regard to Jason Fallis' cervical spine, lumbar spine,

right and left shoulders, right and left knees. Dr. Spataro found that the claimant is not "orthopedically disabled" and is able to "do his normal activities without restrictions" and the injuries sustained in the accident "have resolved without any permanency."

The plaintiff submits an undated affirmation of Dr. Sea Hyun Chung, M.D., a licensed physician of internal medicine. Jason Fallis was under Dr. Chung's care from January 28, 2009 until June 29, 2009 during which time he was treated three of four times a week. Dr. Chung last saw Jason Fallis on June 21, 2010 and he noted that Jason Fallis' condition "was and remained poor" although "no fault" coverage had ceased and Jason Fallis was unable to continue treatment although such treatment would have ameliorated his pain. He notes that the "patient's condition is permanent and any medical treatments he receives are palliative in nature" all as a result of the accident. In the infant's initial examination conducted with a goniometer Dr. Chung conducted a range of motion tests finding that Jason Fallis movement "was severely restricted with pain" . Movement of the patient's cervical spine was restricted from between ten to fifteen degrees. In his last examination in 2010 Dr. Chung found that the infant's range of motion was restricted by five to ten degrees with regard to his cervical spine. A set of similar tests were done on Jason Fallis' lumbar spine with a restriction of ten to fifteen degrees in his initial examination to five to ten degrees on his last examination. In his most recent examination Dr. Chung stated that "palpatory tenderness was noted in the cervical region at Occiput, through C-2, C-5 through C-7. In the thoracic region at T-1 through T-4. In the cervical region at L-3 through L-5." He noted muscle spasm with regard to Jason Fallis' legs. He noted that in his most recent examination that this plaintiff "showed impaired function as evidenced by loss of active range of motions in the cervical spine, lumbar spine, and left knee." Dr. Chung's prognosis was "guarded". Jason Fallis can expect "chronic pain with periodic serious exacerbation" and he "will require lifetime conservative care" that he has "sustained permanent injuries" due to the accident which will prevent him "from performing many of the material acts which constitute his usual and customary daily activities" and the injuries "are permanent in nature to a reasonable degree of medical certainty and have resulted in the permanent consequential limitation of use of a body organ or member. The injuries have resulted in a permanent consequential limitation of use of the patient's neck and back. There is a significant limitation of use of the body function or system."

JOSHUA FALLIS:

The defendant Degioia submits the affirmation of Dr. Anthony

Spataro, M.D., a Board Certified Orthopedic Surgeon dated March 30, 2010. The claimant, a twelve year old, was a back seat passenger. This claimant's mother represents that this claimant hurt his neck, back, both shoulders and left knee. This claimant complains of "some symptoms in his shoulder". The claimant's movement was measured with a goniometer. Dr. Spataro found that there was no restriction of movement with regard to Joshua Fallis' cervical spine, lumbar spine, right and left shoulders, right and left knees. Dr. Spataro found that the claimant is not "orthopedically disabled" and is able to "do his normal activities without restrictions" and the injuries sustained in the accident "have resolved without any permanency."

The plaintiff submits an undated affirmation of Dr. Sea Hyun Chung, M.D., a licensed physician of internal medicine. Joshua Fallis was under Dr. Chung's care from January 28, 2009 until June 29, 2009 during which time he was treated three of four times a week. Dr. Chung last saw Joshua Fallis on June 21, 2010 and he noted that Joshua Fallis' condition "was and remained poor" although "no fault" coverage had ceased and Joshua Fallis was unable to continue treatment although such treatment would have ameliorated his pain. Dr. Chung notes that Joshua Fallis' "symptoms are getting progressively worse. Activities that aggravate the symptoms are standing, bending, lifting, twisting, turning, and coughing." He notes that the "patient's condition is permanent and any medical treatments he receives are palliative in nature" all as a result of the accident. In Joshua Fallis' initial examination conducted with a goniometer Dr. Chung conducted a range of motion tests finding that Jason Fallis movement "was severely restricted with pain" . Movement of the patient's cervical spine was restricted from between ten to fifteen degrees. In his last examination in 2010 Dr. Chung found that this patient's range of motion was restricted by five to ten degrees with regard to his cervical spine. Dr. Chung conducted objective range of motion tests with regard to this patient's left shoulder. Dr. Chung's initial examination found that Jason Fallis' range of motion was restricted form twenty-five to thirty degrees. In his most recent examination Dr. Chung found between five and twenty-five degrees of restriction. In his most recent examination Dr. Chung stated that "palpatory tenderness was noted in the cervical region at Occiput, through C-2, C-5 through C-7. In the thoracic region at T-1 through T-4. In the cervical region at L-3 through L-5." He noted muscle spasm with regard to Joshua Fallis' knees. Dr. Chung referred Joshua Fallis to Kissena Medical Imaging and Central Radiology, P.C., and Joshua Fallis' MRI of his cervical spine performed March 28, 2008 revealed "intervertebral disc bulge at C4-5, C5-6, and C7-T1." It was Dr. Chung's opinion that his most recent examination was consistent with the MRI results. Jason Fallis also had an MRI

of left shoulder on February 21, 2009 which revealed a "partial tear supraspinatus tendon; tendinopathy subscapularis tendon; and multiple septated cysts in the subacromial space." His examination on June 21, 2010 was consistent with the MRI. Dr. Chung's prognosis was "guarded". Joshua Fallis can expect he will be "subject to remission and exacerbation caused by various aggravations such as bad weather, occasional hard work or sports activities" he "will require lifetime conservative care" that he will have to "alter his everyday life styles in order to cope with" the injuries to his neck and shoulder, he will "experience accelerated arthritic changes in neck and left shoulder" and these injuries due to the accident which will prevent him "from performing many of the material acts which constitute his usual and customary daily activities" and the injuries "are permanent in nature to a reasonable degree of medical certainty and have resulted in the permanent consequential limitation of use of the patient's neck and left shoulder. There is a significant limitation of use of the body function or system; more specifically, there is a significant limitation of use of the patient's neck and left shoulder."

This plaintiff also submits the MRI report dated March 28, 2009 and the affirmation of Dr. Ayoub Khodadadi, M.D., a Board Certified Radiologist who performed the MRI of this plaintiff's left shoulder.

Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (*Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury", however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

Here the defendant has come forward with sufficient evidence to support his claim that the plaintiffs have not sustained any "serious injury" (*Gaddy v Eyler*, 79 NY2d 955).

To establish that each plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, that plaintiff must demonstrate more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller*, 258 AD2d 783; *Burnett v Miller*, 255 AD2d 541). Resolution of the issue of whether "serious injury" has been

sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Dufel v Green*, 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiffs have raised triable factual issue as to whether each plaintiff has satisfied the proof necessary to demonstrate injuries which meet the "permanent consequential" and "significant limitation" categories.

The question presented as to the difference between the measurements of the plaintiffs and defendant create an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.*, 48 AD3d 306).

Generally, an unexplained cessation of medical treatment may be fatal to the plaintiff's claim of a significant or permanent consequential limitation (*Baez v Rahamatali*, 24 AD3d 256 *aff'd* 6 NY2d 868) A diagnosis of permanency having been sustained by the plaintiff obviates the need for further treatment and, therefore, there is no "gap" in treatment (*Pommells v Perez*, 4 NY3d 566). Also, a finding by the treating physician, Dr. Chung, that continued treatment would be merely palliative can be considered a sufficient explanation for cessation of treatment (*Toure v Avis Rent A Car Systems*, 98 NY2d 345; *Turner-Brewster v Arce*, 17 AD3d 189). Further, a statement by the plaintiff that he stopped treatment after no-fault benefits were terminated because of his penury is not, but itself, grounds for dismissal (*Delorbe v Perez*, 59 AD3d 491).

Each plaintiff has failed to demonstrate that he has a "medically determined" injury or impairment which has prevented his from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident. (*Ayotte v Gervasio*, 81 NY2d 1062; *Johnson v Berger*, 56 AD3d 725; *Roman v Fast Lane Car Service, Inc.*, 46 AD3d 535).

Regarding the "permanent loss of use" of a body organ, member or system each plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff's life (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295). The finding of "permanency" is established by submission of a recent examination (*Melino v Lauster*, 195 AD2d 653 *aff'd* 82 NY2d 828). The mere existence of a herniated disc even a tear in a tendon is not evidence of serious physical injury without other objective evidence (*Sapienza v Ruggiero*, 57 AD3d 643; *Piperis v Wan*, 49 AD3d 840).

Regarding "permanent limitation" of a body organ, member or system each plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang*, 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyler*, 79 NY2d 955). Here, the affirmation of Dr. Chung has satisfied that requirement.

The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration (*Dufel v Green*, 84 NY2d 795; *Fung v Uddin*, 60 AD3d 992; *Hoxha v McEachern*, 42 AD3d 433; *Barrett v Howland*, 202 AD2d 383). Here, the affirmation of Dr. Chung has satisfied that requirement.

Each plaintiff has demonstrated that he has sustained a "serious injury" as defined in the Insurance Law. However, neither plaintiff has demonstrated that he has sustained an injury which results in a loss of 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.

Accordingly, the defendant's motion is denied except as to that portion dealing with each plaintiff's allegation that they sustained an injury which results in a loss of 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.

So Ordered.

Dated: Long Island City, N.Y.  
October 6, 2010

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**ROBERT J. MCDONALD**  
**J.S.C.**