

**Connis v Menichetti**

2010 NY Slip Op 33544(U)

December 2, 2010

Sup Ct, Broome County

Docket Number: 2008-1375

Judge: Ferris D. Lebus

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District in the Broome County Courthouse, 92 Court Street, City of Binghamton, New York, on the 19<sup>th</sup> day of November, 2010.

PRESENT: HON. FERRIS D. LEBOUS  
Justice Presiding.

STATE OF NEW YORK  
SUPREME COURT : : BROOME COUNTY

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ROBERT CONNIS,

Plaintiff,

-vs-

M.E. MENICHETTI, JR.,

Defendant.

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DECISION AND ORDER

Index No. 2008-1375

RJI No. 2010-1384-M

APPEARANCES:

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**FERRIS D. LEBOUS, J.S.C.**

Plaintiff, Robert Connis, commenced this action against defendant M.E. Menichetti, Jr., seeking to recover for personal injuries suffered in an automobile accident.

By way of this motion, plaintiff moves for: (1) partial summary judgment on the issue of negligence; (2) summary judgment on the issue of serious injury; and (3) preclusion of video surveillance.<sup>1</sup>

**BACKGROUND****A. The Accident**

This automobile accident occurred on January 17, 2007, at 11:24 a.m., on Oakdale Road located in Johnson City, New York.

Plaintiff avers he was traveling southbound on Oakdale Road behind a transit bus and another vehicle when the bus stopped to load/unload passengers and traffic came to a halt behind the bus. While stopped, plaintiff's vehicle was hit from behind by defendant's vehicle, a dump truck. For his part, defendant alleges he was operating his dump truck directly behind plaintiff's vehicle when a sudden sun glare prevented him from seeing the stopped traffic and he collided with the rear of plaintiff's vehicle. However, defendant also testified during his deposition that the sun glare had already interfered with his vision twice immediately preceding this accident and

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<sup>1</sup>The parties have stipulated that defendant shall be precluded at trial from offering video surveillance of plaintiff from November 2008. The parties further stipulate that said preclusion does not apply to video surveillance of plaintiff from September 2009.

each time he would slow down then pick up speed again. Defendant also testified that he never saw the bus prior to this accident.

**B. Plaintiff's Medicals**

Plaintiff's vast medical records preclude a verbatim recitation of each visit to and/or treatment by various medical providers. However, the court will attempt to summarize the relevant portions of plaintiff's medical history in chronological sequence.

A CT scan of the cervical spine was performed on the date of the accident, January 17, 2007, and notes the following impression: "Minor degenerative disc disease and bulging at the C3-4 and 4-5 levels" (Pl Ex H).

An MRI of the cervical spine performed on May 23, 2007 notes "[s]evere C3-4 degenerative disc disease. Small central C3-4 and C4-5 disc protrusions, without evidence of neural compression or focal left sided abnormality" (Pl Ex I).

On June 20, 2007, plaintiff was examined by Matthew T. Bennett, M.D. of the Southern New York Neurosurgical Group, P.C. whose report notes as follows:

[n]o tenderness to palpation along the cervical paraspinal musculature. No trigger points in trapezius or parascapular region. Range of motion: He can extend to neutral. He can forward flex chin 2 finger-breadths to chest. Lateral rotation is symmetrically diminished at 45 degrees. Spurling's causes neck pain bilaterally. He has significant discomfort in the perispinal muscles, trapezii, periscapular muscles. The left side of the neck is much more

tender than the right. He has significant tenderness in the suboccipital region. Palpating this region recreates pain that radiates into the area of the left ear.

(Pl Ex I, Dr. Bennett's report, p 2).

On September 7, 2007, plaintiff was examined by Ronnie Kanas, M.D. with The Center for Pain Relief. With respect to plaintiff's spine, Dr. Kanas noted "[l]imited range of motion. Flexion, extension, lateral bending to the left with rotation to the left increased his pain significantly. Pain to palpation throughout the cervical spine into the shoulder trapezius as well. Positive Spurling sign" (Pl Ex J).

An x-ray report of the cervical spine taken on November 8, 2007 states "[t]here is normal anatomic alignment. No abnormal motion is identified of the flexion and extension views. No definite vertebral body fractures are identified. There is disc space narrowing and end-plate sclerosis at the C3/C4 level, as before. The visualized soft tissues are grossly unremarkable" (Pl Ex I).

Plaintiff was also seen in 2007 by Douglas J. Taber, D.C. Mr. Taber's objective findings from an office note on May 8, 2007 state: "[o]n active range of motion testing in the cervical region, flexion was mildly restricted by pain at end range, extension was moderately restricted by pain, right lateral flexion was moderately restricted by pain, left lateral flexion was mildly restricted by pain at end range, right rotation was mildly restricted by pain at end range and left

rotation was mildly restricted by pain at end range" (Pl Ex K).

On June 15, 2009, plaintiff was examined by Marc Bergeron, M.D., an orthopedic surgeon as part of an independent medical examination for workers compensation. Dr. Bergeron's report lists plaintiff's diagnosis as "cervical sprain, with preexisting significant degenerative change with abnormal MRI...mainly showing 'severe' degenerative changes at C3-4" (Pl Ex M). Further, Dr. Bergeron opines there is a causal relationship between this accident and plaintiff's injuries "as the claimant reports no prior problem with his cervical area or left upper extremity, and no reinjury" (*Id.*). Dr. Bergeron concludes that "the degree of orthopaedic disability is best estimated as partial moderate and permanent" (*Id.*).

On September 23, 2009, plaintiff was examined for another independent medical examination by W. David Ferraraccio, M.D., an orthopaedic surgeon. Dr. Ferraraccio's impression is stated, in part, as "degenerative disc disease with bulging disc C3-4 and C4-5 per cervical spine CT 01/17/07" (Pl Ex O). Dr. Ferraraccio assesses plaintiff as suffering a "moderate to marked level of disability" (*Id.*). Thereafter, Dr. Ferraraccio issued two supplemental reports dated October 12, 2009 and December 28, 2009, respectively, in response to additional discovery (Pl Ex P). The later report states, in part, "[d]uring my examination the range of motion was active, which means that I requested the patient to flex the cervical spine and most people will do so up until the point of discomfort. Measurement would then be taken at that point so it is a partially subjective and partially objective finding. There was no determination based on the actual mechanical ability to move further" (Pl Ex P, Supplemental

Report dated December 28, 2009, p 4).

Finally, on August 23, 2010, plaintiff was examined by his own expert, Joseph E. Ortiz, M.D., an orthopedic surgeon. Dr. Ortiz opined that plaintiff suffered a permanent, partial disability from "cervical strain superimposed on degenerative disc disease, cervical spine" (Pl Ex M).

## DISCUSSION

### **I. NEGLIGENCE**

Fault-based motions for summary judgment in favor of a motor vehicle plaintiff are directed to the issue of *negligence*, as distinguished from *liability* which includes *both* negligence and serious injury (*Ruzycki v Baker*, 301 AD2d 48, 51 [4<sup>th</sup> Dept 2002]).

Plaintiff argues that partial summary judgment is proper given defendant's deposition admissions that he did not stop his vehicle and did not see plaintiff's car. Plaintiff contends this proof satisfies his prima facie burden and shifts the burden to defendant to come forward with evidentiary proof of a non-negligent explanation of the collision (*Johnson v Phillips*, 261 AD2d 269, 271 [1<sup>st</sup> Dept 1999]). The court finds plaintiff has met his burden on the issue of negligence, thereby shifting the burden to defendant to come forward with evidentiary proof raising questions of fact relating thereto.

In opposition, defendant argues this is not a simple rear-end collision case due to

questions of fact raised by the sudden sun glare and the sudden unsignaled stop by the bus both of which were corroborated by a non-party witness.

The court finds that defendant's arguments are without merit. Defendant was required to maintain a safe rate of speed and a reasonable distance between his vehicle and that of plaintiff so as to maintain control of his own vehicle to avoid collisions with other vehicles (Vehicle and Traffic Law § 1129). For this reason, defendant's arguments - which amount to reliance on the emergency doctrine - are not available in this rear-end collision, because defendant himself created or contributed to the emergency by following too closely (*Campanella v Moore*, 266 AD2d 423, 424 [2<sup>nd</sup> Dept 1999]; *Pappas v Opitz*, 262 AD2d 471 [2<sup>nd</sup> Dept 1999]; *Gage v Raffensperger*, 234 AD2d 751, 752 [3<sup>rd</sup> Dept 1996]; *Sweeney v McCormick*, 159 AD2d 832, 833 [3<sup>rd</sup> Dept 1990]).

In view of the foregoing, the court finds that plaintiff's motion for partial summary judgment on the issue of negligence is GRANTED. The court will next turn its analysis to defendant's motion addressing the issue of serious injury.

## **II. SERIOUS INJURY**

Plaintiff contends that his injuries qualify as a "serious injury" as that term is defined in Insurance Law § 5102 under the following two categories, namely: (1) permanent consequential limitation of use of a body organ or member; and (2) significant limitation of use of a body function or system (Plaintiff's Bill of Particulars, ¶ 11; Plaintiff's Amended Bill of Particulars, ¶

12).<sup>2</sup>

The Court of Appeals has explained that the "limitation of use" in these two categories may be established in one of two ways, namely by medical proof of a *quantitative* percentage (e.g., a numeric percentage of a loss of range of motion) or, in the alternative, medical proof of a functional impairment (excluding loss of range of motion) by way of a medical expert's *qualitative* assessment of plaintiff's current condition as compared to his normal function (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). The term "significant" means the "limitation" must be shown to be more than minor, mild or slight as established by expert medical proof (*Licari v Elliott*, 57 NY2d 230, 236 [1982]).

Thus, "[a]s the proponent of the summary judgment motion, plaintiff bore the burden of establishing, as a matter of law, that [he] suffered a serious injury pursuant to Insurance Law § 5102 (d) and that the injury was causally related to the accident [citations omitted]" (*Autiello v Cummins*, 66 AD3d 1072, 1073 [3<sup>rd</sup> Dept 2009]; *Tandoi v Clarke*, 75 AD3d 896 [3<sup>rd</sup> Dept 2010]). Here, plaintiff argues he has established entitlement to summary judgment based upon all the medical reports including the CT scan and MRI results, together with Dr. Ortiz's opinion. More specifically, the CT scan revealed "Minor degenerative disc disease and bulging at the C3-4 and 4-5 levels" while the MRI showed "[s]evere C3-4 degenerative disc disease. Small central C3-4 and C4-5 disc protrusions, without evidence of neural compression or focal left sided

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<sup>2</sup>During oral argument, plaintiff withdrew any arguments based upon the 90/180 day category.

abnormality" (Pl Exs H & I). Based on these reports, as well as the other medicals recited above, Dr. Ortiz opined that plaintiff suffered a permanent, partial disability; Dr. Bergeron concluded plaintiff suffered a "partial moderate and permanent" disability; and Dr. Ferraraccio assessed plaintiff as suffering a "moderate to marked level of disability". In view of the foregoing, defendant concedes that said medical reports and opinions satisfy plaintiff's burden of proof on this motion. Thus, the court's focus will turn to whether defendant has raised a triable issue of fact as to plaintiff's injury through the submission of competent medical evidence (*Horton v Warden*, 32 AD3d 570, 572 [3<sup>rd</sup> Dept 2006]).

Defendant's posture in opposition is unusual. Defendant does not dispute that various medical providers have opined that plaintiff suffers between a moderate and marked disability (Attorney's Affirmation, ¶90). Rather, defendant contends that all of said medical opinions are based in whole or in part upon plaintiff's subjective reports or descriptions of pain thereby raising issues of credibility which are improper for determination on a summary judgment motion.

For example, defendant argues that Dr. Bergeron's conclusion that plaintiff suffers from a "partial moderate and permanent" disability is based on a physical examination in which he noted that "[w]ith careful testing, all muscle groups were functional, and weakness appeared to be solely on the basis of pain" (Pl Ex N, p 3). Dr. Bergeron further noted that range of motion was 80% of expected and that no spasm was witnessed or palpated (*Id.*).

Further, while Dr. Ferraraccio found a "moderate to marked level of disability" he also

noted that plaintiff's "subjective complaints and objective findings are generally consistent, although his sensory examination is not consistent with the findings demonstrated on the MRI or CT study" (Pl Ex O, p 8).

Additionally, with respect to plaintiff's description of his injuries to his various medical providers, defendant notes that plaintiff's own physicians have highlighted issues of his veracity in describing complaints as follows:

- follow-up/procedure note from Ronnie Kanas, M.D. dated October 26, 2007 states upon physical exam plaintiff "[h]as a range of motion which is quite good. He says his pain level is 9. He does not appear to be in excruciating pain" (Def Ex B);
- follow-up note from Louis P. Mateya, M.D. dated May 12, 2009 states increasing neck pain, as well as "[i]t may be notable that the pain does not seem to radiate in a physiologic distribution" (Def Ex C, page 1);
- follow-up note from Cori Pane, FNP upon complaints of cramping in the left calf and tremors in the left arm after injections indicates "[t]he twitching and tremors are not observable in the office today. I cannot relate them directly to his spinal condition or the injections" (Def Ex D);
- Plaintiff testified in his deposition that he was left-hand dominate although conceded at one time he was right hand dominant (Pl Ex F, p 52). Plaintiff reported to medical providers that he was right hand dominant (Def Ex E, page 1; Def Ex F, "Clinical Report - Physician/Mid Levels", page 1);
- inconsistencies in holding head to the right side (Def Exs E & G) versus the left side (Def Ex H).

It is well-settled that range of motion findings that are secondary to complaints of pain are insufficient to support a serious injury determination (*Uddin v Cooper*, 32 AD3d 270, 271 [1<sup>st</sup> Dept 2006], *lv denied* 8 NY3d 808 [2006]; *Broderick v Spaeth*, 241 AD2d 898 [3<sup>rd</sup> Dept 1997], *lv*

*denied* 91 NY2d 805 [1998]; *Hawkey v Jefferson Motors*, 245 AD2d 785 [3<sup>rd</sup> Dept 1997]; *Durham v New York E. Travel*, 2 AD3d 1113 [3<sup>rd</sup> Dept 2003]; *Gillick v Knightes*, 279 AD2d 752 [3<sup>rd</sup> Dept 2001]). Here, as in *Hawkey*, the court finds that defendant has raised questions of fact as to plaintiff's injury by demonstrating that the medical opinions on which plaintiff relies are based, in large part, upon plaintiff's reports of pain. Consequently, "[d]efendant's arguments amount to challenges to [plaintiff's] credibility, a matter that is properly left for the fact finder [citations omitted]" (*Hawkey*, 245 AD2d at 768).

Additionally, defendant argues that there are other inconsistencies in plaintiff's history that raise credibility issues. For instance, defendant submits documentation which raises issues of plaintiff's veracity in reporting his work status to the Social Security Administration. Also, there is video surveillance of plaintiff from September 2009 in which plaintiff turns his head all the way to his left shoulder with no visible indication of pain or difficulty.<sup>3</sup>

In view of the foregoing, the court finds that defendant has raised a triable issue of fact as to plaintiff's injury by raising issues of plaintiff's credibility in reporting and describing his injuries and pain.

### **CONCLUSION**

In view of the foregoing, the court finds as follows:

- (A) Plaintiff's motion for partial summary judgment on the issue of negligence is GRANTED; and

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<sup>3</sup>The September 2009 video surveillance is not subject to preclusion.

- (B) Plaintiff's motion for summary judgment on the issue of serious injury is DENIED; and
- (C) Plaintiff's motion seeking preclusion of video surveillance evidence from November 2008 is GRANTED.

It is so ordered.

Dated: December 2, 2010  
Binghamton, New York

s/ Ferris D. Lebous \_\_\_\_\_  
Hon. Ferris D. Lebous  
Justice, Supreme Court

**ALL PAPERS SUBMITTED IN CONNECTION WITH THIS MOTION HAVE BEEN FILED, ALONG WITH THE ORIGINAL DECISION AND ORDER, WITH THE BROOME COUNTY CLERK**