

<b>Williams v Karwowski</b>
2011 NY Slip Op 32771(U)
September 16, 2011
Sup Ct, Suffolk County
Docket Number: 08-45127
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 3-31-11  
ADJ. DATE 5-19-11  
Mot. Seq. # 002 - MD  
# 003 - XMD

-----X

CLYDESA WILLIAMS,

Plaintiff,

- against -

ELZBIETA KARWOWSKI, MICHAEL  
KARWOWSKI, and LUIS A. PILLACELA,

Defendants.

-----X

**Action No. 1**  
Index No. 08-45127

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LUIS A. PILLACELA,

Plaintiff,

- against -

ELZBIETA KARWOWSKI, MICHAEL  
KARWOWSKI,

Defendants.

-----X

**Action No. 2**  
Index No. 09-29918

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Upon the following papers numbered 1 to 30 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-17 ; Notice of Cross Motion and supporting papers 18-21 ; Answering Affidavits and supporting papers 23-30 ; Replying Affidavits and supporting papers \_\_\_\_\_ ; Other \_\_\_\_\_ ; it is,

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Williams v Karwowski

Index No. 08-45127

Page 2

**ORDERED** that this motion by defendant Luis Pillacela seeking summary judgment dismissing plaintiff's complaint and all cross claims against him is decided as follows; and it is further

**ORDERED** that this cross motion by defendants Elzbieta Karwowski and Michael Karwowski seeking summary judgment dismissing plaintiff's complaint is denied.

Plaintiff Clydesa Williams commenced this action against defendants Luis Pillacela, Elzbieta Karwowski and Michael Karwowski to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred in the left lane of the westbound Long Island Expressway, at or near its Kissena Boulevard exit, in Queens, New York on October 13, 2007. The accident allegedly occurred when the vehicle owned and operated by defendant Luis Pillacela struck the rear of the vehicle in which plaintiff was a backseat passenger. It is further alleged that prior to striking the rear of plaintiff's vehicle, which was stopped in traffic, defendant Pillacela's vehicle was struck in the rear by the vehicle owned by defendant Elzbieta Karwowski and operated by defendant Michael Karwowski. As a result of the initial impact between the Pillacela and Karwowski vehicles, the Pillacela vehicle was pushed forward into the rear of the vehicle in which plaintiff was a passenger. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including lumbar sprain; lumbar radiculopathy; a disc bulge at level L4-L5; and aggravation and/or exacerbation of a previously asymptomatic degenerative disc disease of the lumbosacral spine. Plaintiff alleges that following the accident she was confined to her home and bed from October 13, 2007 to January 19, 2008. Plaintiff further alleges that she was incapacitated from her employment as a volunteer coordinator for Suffolk Independent Living Organization for approximately three months after the accident.

Defendant Pillacela moves for summary judgment on the basis that the injuries allegedly sustained by plaintiff as a result of the subject accident fail to meet the "serious injury" threshold requirement of Insurance Law § 5102 (d). Alternatively, defendant Pillacela contends that Michael Karwowski's failure to stop his vehicle when the traffic ahead stopped is the sole proximate cause of the subject accident. In support of the motion, defendant Pillacela submits copies of the pleadings, the parties' deposition transcripts, his own affidavit and a copy of the police accident report. Defendant Pillacela also submits the sworn medical reports of Dr. Arthur Bernhang and Dr. Mark Zuckerman. Dr. Bernhang conducted an independent orthopedic examination of plaintiff at defendant Pillacela's request on December 14, 2009. Dr. Zuckerman conducted an independent neurological examination of plaintiff at defendant Pillacela's request on December 22, 2009. Defendants Karwowski cross-move for summary judgment on the basis that plaintiff did not sustain an injury within the serious injury threshold requirement of Insurance Law § 5102 (d) as a result of the subject accident. Defendants Karwowski rely on the same evidence as defendant Pillacela in his motion for summary judgment.

Plaintiff opposes the motion for summary judgment and the cross motion for summary judgment on the ground that defendants Pillacela and Karwowski failed to meet their burden that she did not sustain an injury within the "limitations of use" categories of Insurance Law § 5102 (d). In opposition to the motion, plaintiff submits her own affidavit, the medical reports of Dr. John Saugy and Dr. Seth Steinman, a copy of the police accident report and uncertified copies of plaintiff's treatment records.

It has long been established that the “legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries” (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a “serious injury” is to be made by the court in the first instance (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [1984], *aff’d* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

Insurance Law § 5102 (d) defines a “serious injury” as “a personal injury which 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 constitute 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.”

To recover under the “limitations of use” categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). A sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part may also suffice (*see Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Dufel v Green*, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]). Unsworn medical reports of a plaintiff’s examining physician or chiropractor are insufficient to defeat a motion for summary judgment (*see Grasso v Anegarmi*, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant’s examining expert (*see Caulkins v Vicinanza*, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a “serious injury” (*see Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (*see*

*Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for “serious injury” under New York’s No-Fault Insurance Law (see *Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*). However, if a defendant does not establish a *prima facie* case that the plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff’s opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants Pillacela and Karwowski have failed to demonstrate their *prima facie* entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see *Charley v Goss*, 12 NY3d 750, 876 NYS2d 700 [2009]; *Toure v Avis Rent A Car Sys.*, *supra*; *Smith v Hartman*, 73 AD3d 736, 899 NYS2d 648 [2d Dept 2010]). Dr. Bernhang’s report states that the extension of plaintiff’s spine is 30 degrees and that she has back pain. The report also states that the subject accident aggravated plaintiff’s pre-existing spondylolitic changes in her lumbar spine. Therefore, it cannot be said as a matter of law, based upon Dr. Bernhang’s report, that plaintiff’s aggravation of a pre-existing lumbar condition does not constitute a serious injury within the meaning of the Insurance Law or that she did not sustain an aggravation of such condition (see *Pero v Transervice Logistics, Inc.*, 83 AD3d 681, 920 NYS2d 364 [2d Dept 2011]; *Rabinowitz v Kahl*, 78 AD3d 678, 910 NYS2d 166 [2d Dept 2010]; *Pfeiffer v New York Cent. Mut. Fire Ins. Co.*, 71 AD3d 971, 900 NYS2d 71 [2d Dept 2010]).

Moreover, the medical report of Dr. Zuckerman failed to shift the burden to plaintiff to come forward with evidence in admissible form demonstrating that she sustained a serious injury within the meaning of Insurance Law § 5102 (d) (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Reed v Righton Limo*, 82 AD3d 1070, 918 NYS2d 899 [2d Dept 2011]). In his report, Dr. Zuckerman states that an examination of plaintiff’s lumbar spine reveals flexion of 30 degrees (normal is 90 degrees), lateral flexion of 25 degrees (normal is 30 degrees), and extension of 25 degrees (normal is 30 degrees). The report states that “cervical range of motion was performed with 75/80 degrees to the right and left initially 65 without pain and she continued at least 75 degrees to flex 45/45 degrees and extend 40/40 degrees.” It states that there is no tenderness or spasm in the cervical or lumbar regions of her spine. Dr. Zuckerman opines that plaintiff’s lumbar spine has decreased range of motion, that she has persistent lumbar complaints with self limitations of range of motion, and that her underlying degenerative disc disease may have prolonged her recovery. The report concludes that there is a causal relationship between plaintiff’s lumbar sprain and her residual subjective lumbar complaints. Thus, Dr. Zuckerman has identified significant limitations in the range of motion of plaintiff’s lumbar spine based upon a recent examination, which took place almost two years after the subject accident (see *Grisales v City of New York*, 85 AD3d 964, 925 NYS2d 633 [2d Dept 2011]; *Artis v Lucas*, 84 AD3d 845, 921 NYS2d 910 [2011]; *Smith v Hartman*, *supra*). While Dr. Zuckerman notes that plaintiff’s limitations were subjective in nature, he failed to explain or substantiate, with objective medical evidence, the basis for his conclusion that the noted limitations were self-imposed (see *Astudillo v MV Transp., Inc.*, 84

AD3d 1289, 923 NYS2d 722 [2d Dept 2011]; *Iannello v Vasquez*, 78 AD3d 1121, 911 NYS2d 654 [2d Dept 2011]; *Reitz v Seagate Trucking, Inc.*, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]; *Hi Ock Park-Lee v Voleriaperia*, 67 AD3d 734, 888 NYS2d 215 [2d Dept 2009]). Furthermore, despite Dr. Zuckerman stating that plaintiff suffers from an underlying degenerative disc disease, he failed to address whether the subject accident aggravated an asymptomatic degenerative condition in her lumbar spine (see *Keenum v Atkins*, 82 AD3d 843, 918 NYS2d 547 [2d Dept 2011]; *Benson v Lillie*, 72 AD3d 1619, 901 NYS2d 769 [2d Dept 2010]; *McKenzie v Redl*, 47 AD3d 775, 850 NYS2d 545 [2d Dept 2008]).

Since defendants Pillacela and Karwowski failed to establish a *prima facie* case that plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of plaintiff's opposition papers (see *Pfeiffer v New York Cent. Mut. Fire Ins. Co.*, *supra*; *McKenzie v Redl*, *supra*; *Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]). Accordingly, the branch of defendant Pillacela's motion seeking summary judgment dismissing the complaint on the ground that plaintiff failed to sustain a serious injury is denied.

However, defendant Pillacela has met his *prima facie* burden entitling him to judgment as a matter of law on the issue of liability (see *Staton v Ilic*, 69 AD3d 606, 892 NYS2d 486 [2d Dept 2010]; *Jumandeo v Franks*, 56 AD3d 614, 867 NYS2d 541 [2d Dept 2008]). A rear-end collision with a stopped vehicle creates a *prima facie* case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (see *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Ramirez v Konstanzer*, 61 AD3d 837, 837 NYS2d 381 [2d Dept 2009]; *Hakakian v McCabe*, 38 AD3d 493, 833 NYS2d 106 [2d Dept 2007]). However, the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (*Chepel v Meyers*, 306 AD2d 235, 237, 762 NYS2d 95 [2d Dept 2003]; see *Carhuayano v J&R Hacking*, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; *Gaeta v Carter*, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]; *Purcell v Axelsen*, 286 AD2d 379, 729 NYS2d 495 [2d Dept 2001]; *Colonna v Suarez*, 278 AD2d 355, 718 NYS2d 618 [2d Dept 2000]; see also Vehicle and Traffic Law § 1163). A non-negligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead is sufficient to overcome the inference of negligence and preclude an award of summary judgment (*Danner v Campbell*, 302 AD2d 859, 859, 754 NYS2d 484 [4th Dept 2003]; see *Davidoff v Mullokandov*, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; *Carhuayano v J&R Hacking*, 28 AD3d 413, 812 NYS2d 162 [2d Dept 2006]; *Rodriguez-Johnson v Hunt*, 279 AD2d 781, 718 NYS2d 501 [3d Dept 2001]).

Here, although the vehicle operated by defendant Pillacela rear-ended the vehicle in which plaintiff was riding as a passenger, the record demonstrates that the parties were involved in a chain collision accident that started when the vehicle driven by defendant Michael Karwowski struck the rear of the Pillacela vehicle. "Evidence that a vehicle was rear-ended and propelled into the stopped vehicle in front of it may provide a sufficient non-negligent explanation" (*Katz v Masada II Car & Limo Serv., Inc.*, 43 AD3d 876, 877, 841 NYS2d 370 [2d Dept 2007]; see *Harris v Ryder*, 292 AD2d 499, 739 NYS2d 195 [2d Dept 2002]; *Campanella v Moore*, 266 AD2d 423, 699 NYS2d 76 [2d Dept 1999]; *Escobar v Rodriguez*, 243 AD2d 676, 664 NYS2d 568 [2d Dept 1997]). Despite the fact that defendant Pillacela testified that he "braked hard" when he realized that the traffic ahead was stopping, he also

Williams v Karwowski

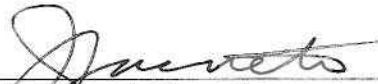
Index No. 08-45127

Page 6

testified that he was stopped for approximately three seconds before the Karwowski vehicle struck the rear of his vehicle, and that he heard the tires of the Karwowski vehicle screeching prior to the impact. Therefore, defendant Pillacela met his burden on the motion by providing a non-negligent explanation for the collision between his vehicle and the vehicle that plaintiff was riding in (*see Daramboukas v Samlidis*, 84 AD3d 719, 922 NYS2d 207 [2d Dept 2011]; *Franco v Breceus*, 70 AD3d 767, 895 NYS2d 152 [2d Dept 2010]; *Katz v Masada II Car & Limo Serv., Inc.*, *supra*). Moreover, at his deposition, Michael Karwowski testified that he saw the brake lights of the vehicle ahead come on, that he was unable to stop in time, and that “[he] hit him into the lady.” Under these circumstances, defendant Pillacela has demonstrated that his actions were not the proximate cause of the subject accident’s occurrence or the injuries sustained by plaintiff (*see Hauser v Adamov*, 74 AD3d 1024, 904 NYS2d 102 [2d Dept 2010]; *Hyeon Hee Park v Hi Taek Kim*, 37 AD3d 416, 831 NYS2d 422 [2d Dept 2007]; *Bournazos v Malfitano*, *supra*, *Smith v Cafiero*, 203 AD2d 355, 610 NYS2d 76 [2d Dept 1994]), and plaintiff and defendant Karwowski have failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, *supra*).

Accordingly, the branch of defendant Pillacela’s motion seeking summary judgment in his favor on the issue of liability is granted. The action is severed and continued as against the remaining defendants.

Dated: September 16, 2011

  
\_\_\_\_\_  
Hon. Joseph Farneti  
Acting Justice Supreme Court

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