

**Wagstaffe v Weksler**

2020 NY Slip Op 35665(U)

January 16, 2020

Supreme Court, Bronx County

Docket Number: Index No. 26784/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 14

-----X  
WAGSTAFFE, JERMAR, et ano.

Index No. 26784/2018E

- against -

Hon. **JOHN R. HIGGITT**,

WEKSLER, MICHAELA ALEXANDRA, et ano.

J.S.C.

-----X  
The following papers filed in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (DEFENDANT)**, noticed on **October 31, 2019** and duly submitted as **No. 30** on the Motion Calendar of **December 30, 2019**

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	44-55
Answering Affidavit and Exhibits, Memorandum of Law	63-68, 71-79
Replying Affidavit and Exhibits	69, 80

Upon the foregoing papers, defendants’ motion for summary judgment on the ground that plaintiffs did not sustain “serious injuries,” as defined in Insurance Law § 5102(d), is granted in part, in accordance with the annexed decision and order.

Dated: January 16, 2020

Hon. *John R. Higgitt*  
**JOHN R. HIGGITT, J.S.C.**

**Check one:**

- Case Disposed in Entirety
- Case Still Active

**Motion is:**

- Granted  GIP
- Denied  Other

**Check if appropriate:**

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

-----X

JERMAR WAGSTAFFE and SHAKIRA THOMAS,  
Plaintiffs,

DECISION AND ORDER

- against -

Index No. 26784/2018E

MICHAELA ALEXANDRA WEKSLER and MILDRED  
WEKSLER,

Defendants.

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John R. Higgitt, J.

Upon defendants' September 3, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff Shakira Thomas' December 4, 2019 affirmation in opposition and the exhibits submitted therewith; plaintiff Jermar Wagstaffe's December 20, 2019 affirmation in opposition and the exhibits submitted therewith; defendants' December 10, 2019 and December 27, 2019 affirmations in reply; and due deliberation; defendants' motion for summary judgment on the ground that plaintiffs did not sustain "serious injuries," as defined in Insurance Law § 5102(d), in the subject February 1, 2018 motor vehicle accident is granted in part.

In support of the motion, defendants submitted the sworn reports of an orthopedic surgeon, Pierce J. Ferriter, M.D., and the transcripts of plaintiffs' June 11, 2019 deposition testimony.

**PLAINTIFF JERMAR WAGSTAFFE**

Plaintiff Wagstaffe alleges that, as a result of the subject accident, he sustained injuries to his right knee and the cervical and lumbar aspects of his spine. Plaintiff Wagstaffe also alleges exacerbation and aggravation of any preexisting, asymptomatic conditions. Plaintiff Wagstaffe alleges "serious injury" under the categories of fracture, permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury.

Plaintiff Wagstaffe's deposition testimony demonstrates that he was in a prior motor vehicle accident over ten years ago, as a result of which he underwent radiological studies, received medical

treatment, was represented by an attorney and received compensation for his injuries. However, plaintiff Wagstaffe testified that he could not remember which body part, if any, was injured in the prior accident. At his July 8, 2019 examination by Dr. Ferriter, one month later, he reported that he sustained no injuries in the prior accident.

Defendants' evidence was sufficient to demonstrate, prima facie, that plaintiff Wagstaffe did not sustain significant or permanent consequential limitations of the use of his right knee, cervical spine and lumbar spine as a result of the accident (*see Thompson v Bronx Merchant Funding Servs., LLC*, 166 AD3d 542, 543 [1st Dept 2018]; *Fernandez v Hernandez*, 151 AD3d 581, 581 [1st Dept 2017]). Dr. Ferriter's July 8, 2019 examination of plaintiff Wagstaffe revealed full ranges of motion in all planes of movement of plaintiff's cervical and lumbar spine and knees, no tenderness or spasm upon palpation of the paraspinal muscles, normal neurological testing and negative provocative testing, including straight-leg raising. Dr. Ferriter's examination of plaintiff's right knee revealed well-healed arthroscopic surgical scars, negative provocative testing and no evidence of atrophy or chondromalacia. Dr. Ferriter found no objective evidence of cervical radiculopathy or internal derangement of the right knee. He diagnosed plaintiff Wagstaffe with resolved cervical and lumbar spine sprains/strains and status post right knee arthroscopic surgery, healed.

Dr. Ferriter reviewed the May 11, 2018 operative report and intraoperative photos from plaintiff's right knee arthroscopy. While the operative report noted a postoperative diagnosis of left knee partial anterior cruciate ligament tear, Dr. Ferriter's review of the intraoperative photos found no pathology and no menisci or ligament tears. Dr. Ferriter concluded that there was no objective evidence of permanency, disability or residuals related to the subject accident.

Defendants also assert that there is an unexplained cessation in plaintiff Wagstaffe's treatment that severs any causal connection between the accident and plaintiff Wagstaffe's neck and back injuries (*see Pommells v Perez*, 4 NY3d 566, 574 [2005] ["a plaintiff who terminates therapeutic

measures following the accident, while claiming ‘serious injury,’ must offer some reasonable explanation for having done so”). Here, plaintiff testified that he began treatment for his neck and back injuries shortly after the subject accident. In approximately May 2019, his doctor terminated treatment of his neck and back injuries because he was improving. Accordingly, with regard to plaintiff Wagstaffe’s claims of permanent neck and back injuries, the burden shifts to plaintiff Wagstaffe to provide a reasonable explanation for his cessation of treatment of such injuries (*see Arias v Martinez*, 176 AD3d 548 [1st Dept 2019] [plaintiff’s failure to explain his cessation of treatment after undergoing surgery on his lumbar spine interrupted the chain of causation and rendered his treating physician’s finding of permanency speculative]).

In opposition, plaintiff submitted the affirmations of his treating physician, Ronald Daly, M.D., chiropractor, Bruce Sirlin, D. C., and radiologists, Mark J. Decker, M.D., Regina Moshe, M.D., and Mark J. Lodespoto, M.D. Plaintiff Wagstaffe also submitted an affidavit dated December 11, 2019 wherein he now avers that his prior motor vehicle accident was in June of 2011, he did not injure his knees and required only a short period of treatment. He also contends that he did not have any pain, discomfort or physical limitations before the subject accident. Plaintiff submitted the affidavit of Clovis James, president of the construction and roofing company by whom he was employed at the time of the subject accident.

In opposition, plaintiff Wagstaffe failed to raise an issue of fact as to whether he sustained a “serious injury” related to his right knee as a result of the subject accident because he failed to submit objective evidence of contemporaneous treatment to or limitations of his right knee (*see Cano v U-Haul Co. of Arizona*, \_\_\_ AD3d \_\_\_, 2019 NY Slip Op 08603, at \*1 [2019]; *Stephanie N. v Davis*, 126 AD3d 502 [1st Dept 2015]; *cf. Acosta v Ramos*, 144 AD3d 441, 442 [1st Dept 2016]).

Plaintiff Wagstaffe first received treatment for his claimed right knee injury on April 26, 2018 when he presented to Dr. Daly. Dr. Daly reviewed plaintiff’s medical records, noting that plaintiff

presented to Jacobi Medical Center Emergency Department on February 2, 2018 with complaints of neck and back pain, but no right knee complaints. Dr. Daly further notes that plaintiff Wagstaffe presented to CitiMedical, PLLC (CitiMedical) on February 9, 2018 with complaints of neck and back pain and an episode of pain in both legs, but again no right knee complaints. CitiMedical prescribed physical therapy and MRIs.

Dr. Daly examined plaintiff Wagstaffe on April 26, 2018, noting complaints of bilateral knee pain, neck pain, lower back pain and right shoulder pain. After this initial examination, Dr. Daly diagnosed plaintiff Wagstaffe with “a right knee synovitis,” found plaintiff 50% disabled and recommended right knee arthroscopy. Dr. Daly sets forth no qualitative or quantitative right knee range-of-motion findings from this examination and does not identify what percentage of plaintiff Wagstaffe’s alleged disability is attributed to his claimed right knee injury.

On May 11, 2018, Dr. Daly performed a right knee arthroscopic debridement of the anterior cruciate ligament and major synovectomy. Dr. Daly notes that his arthroscopic examination revealed a partially torn anterior cruciate ligament, tricompartmental reactive hypertrophic incarcerating synovitis and tibial tubercle swelling.

On May 24, 2018, Dr. Daly examined plaintiff Wagstaffe postoperatively for the first time, nearly four months after the accident. This examination revealed right knee stiffness, slight swelling, slight medial and lateral joint line tenderness and restricted right knee flexion to 90 degrees out of a normal 150 degrees. Dr. Daly recommended physical therapy. Dr. Daly’s June 20, 2018 examination of plaintiff Wagstaffe’s right knee revealed that his range-of-motion limitation was no longer “significant” as a matter of law, now between 0 to 130 degrees, out of a normal 150 degrees (*see Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]; *Stevens v Bolton*, 135 AD3d 647, 648 [1st Dept 2016]; *Style v Joseph*, 32 AD3d 212, 214, n \* [1st Dept 2006]).

Although Dr. Daly attributes plaintiff Wagstaffe’s right knee injuries to the subject accident,

plaintiff Wagstaffe fails to raise a triable issue of fact as to whether he sustained a significant and permanent consequential limitation of use of his right knee as a result of the subject accident because he failed to show quantified or qualified assessment of his condition shortly after the accident (*see Perl v Meher*, 18NY3d at 217-218 [2011]; *Parreno v Jumbo Trucking, Inc.*, 40 AD3d 520, 524 [1st Dept 2007]; *Cortez v Manhattan Bible Church*, 14 AD3d 466, 466 [1st Dept 2005]). Plaintiff Wagstaffe's failure to provide contemporaneous objective evidence of complaints of, injury to or limitations in the right knee is fatal to his claims concerning the right knee (*see Barreras v Vargas*, 151 AD3d 620 [1st Dept 2017]; *Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014]). While a contemporaneous MRI was performed, plaintiff Wagstaffe's expert does not explain any basis for such study and, more importantly, the findings were essentially normal and lack objective evidence of injury.<sup>1</sup> Dr. Sirlin, plaintiff's chiropractor, treated plaintiff Wagstaffe for several months immediately following the subject accident, but makes no mention of any right knee complaints in his sworn report. Plaintiff Wagstaffe's first indication of treatment was almost three months after the accident and the range-of-motion limitations noted two weeks after his knee surgery were largely resolved the next month.

Plaintiff Wagstaffe's submissions also fail to raise an issue of fact as to whether he suffered significant and permanent consequential limitations of the use of his cervical and lumbar spine as a result of the accident, because his chiropractor found that plaintiff Wagstaffe's initial limitations in range of motion (a 22% impairment in cervical spine and 18% impairment in the lumbar spine) had improved to near normal within six months after the accident<sup>2</sup> (*see Licari v Elliott*, 57 NY2d at 236; *McLoud v Reyes*, 82 AD3d 848, 849 [2d Dept 2011] [finding a 12% loss in range of motion to be

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<sup>1</sup> Dr. Decker reviewed the films from plaintiff Wagstaffe's February 26, 2018 MRI of his right knee, finding no tears, no cartilage defect, nonacute Osgood-Schlatter's disease and joint effusion. Dr. Daly also notes that plaintiff Wagstaffe's February 26, 2018 MRI reports revealed bilateral patella alta with joint effusion.

<sup>2</sup> Range of motion findings from plaintiff's August 8, 2018 examination revealed a mere 8% impairment in the cervical spine and a 9% impairment in the lumbar spine and plaintiff's provocative testing throughout her treatment was negative.

insignificant within the meaning of the no-fault statute]; *Dieujuste v Kiss Mgt. Corp.*, 60 AD3d 514, 515 [1st Dept 2009] [slight limitations in lumbar spine range of motion immediately after accident, normal MRI findings and almost normal range of motion within six months of accident insignificant within the No Fault statute]; *Lopez v Simpson*, 39 AD3d 420, 421 [1st Dept 2007] [cervical and lumbar strains that resolved 19 months after the accident and a lack of contemporaneous medical evidence showing the severity of plaintiff's injuries insufficient to raise an issue of fact as to "serious injury"]; *see also Perdomo v City of NY*, 129 AD3d 585, 586 [1st Dept 2015]). Moreover, Dr. Daly's July 16, 2019 examination of plaintiff included no recent findings of limitations in cervical or lumbar spine range of motion (*see De Los Santos v Basilio*, 176 AD3d 544 [1st Dept 2019]). Finally, neither plaintiff Wagstaffe nor his experts provide any explanation for his cessation of treatment for his claimed cervical and lumbar spine injuries, supporting the conclusion that he did not sustain a "serious injury" as a result of such injuries (*see Blake v Cadet*, 175 AD3d 1199, 1200 [1st Dept 2019]; *Hessing v Carroll*, 161 AD3d 462, 463 [1st Dept 2018]).

With respect to plaintiff Wagstaffe's claim of "serious injury" under the 90/180-day category, plaintiff Wagstaffe alleged that he was confined to his bed for approximately one month and has been homebound since the date of the accident. Plaintiff Wagstaffe testified that he was confined to his bed for approximately one and a half weeks immediately following the accident and that after his May 11, 2018 surgery he was confined to his home for approximately two months. Plaintiff Wagstaffe testified that at the time of the accident he was employed by his uncle as a construction and roofing laborer, that Dr. Daly advised him not to work and that he has not returned to work since the time of the accident. Plaintiff Wagstaffe testified that he never looked for employment other than construction work. The mere fact that plaintiff Wagstaffe was unable to return to work for 90 days during the 180 days immediately following the accident is not determinative of a 90/180-day injury claim (*see Nieves v Bus Maintenance Corp.*, 129 AD3d 539, 539 [1st Dept 2015]; *Johnson v KS*

*Transp. Inc.*, 115 AD3d 425, 426 [1st Dept 2014]; *Blake v Portexit Corp.*, 69 AD3d 426, 426 [1st Dept 2010]; *Ortiz v Ash Leasing, Inc.*, 63 AD3d 556 [1st Dept 2009]; *Uddin v Cooper*, 32 AD3d 270, 270 [1st Dept 2006], *lv denied* 8 NY3d 808 [2007]).

In opposition, plaintiff Wagstaffe raised a triable issue of fact as to whether he suffered a medically determined injury that prevented him from performing *substantially* all of his customary daily activities within the relevant period (*see Frias v Gonzalez-Vargas*, 147 AD3d 500, 502 [1st Dept 2017]; *Cartha v Quin*, 50 AD3d 530, 530 [1st Dept 2008], *lv denied* 11 NY3d 704 [2008]; *see also Perl v Meher*, 18 NY3d at 220; *Licari v Elliott*, 57 NY2d at 236). Dr. Daly directed plaintiff Wagstaffe to refrain from his employment in construction for at least six months and restricted him from prolonged periods of standing or walking, as well as activities such as climbing, lifting and operating heavy machinery.

#### **PLAINTIFF SHAKIRA THOMAS**

Plaintiff Thomas alleges that, as a result of the subject accident, she sustained injuries to the cervical and lumbar aspects of her spine. Plaintiff Thomas alleges “serious injury” under the categories of dismemberment, significant disfigurement, fracture, permanent loss of use, permanent consequential limitation, significant limitation and a 90/180-day injury.

Defendants’ evidence was sufficient to demonstrate, *prima facie*, that plaintiff Thomas did not sustain significant or permanent consequential limitations of the use of her cervical spine and lumbar spine as a result of the accident (*see Thompson v Bronx Merchant Funding Servs., LLC*, 166 AD3d at 543; *Fernandez v Hernandez*, 151 AD3d at 581). Dr. Ferriter reviewed plaintiff Thomas’ medical records, noting that plaintiff underwent MRIs of her neck and lower back and underwent cervical spine surgery in March 2019. Dr. Ferriter’s July 8, 2019 examination of plaintiff Thomas revealed full ranges of motion in all planes of movement of plaintiff Thomas’ cervical and lumbar spine, no tenderness or spasm upon palpation of the paraspinal muscles, normal neurological testing and

negative provocative testing, including straight-leg raising. Dr. Ferriter's examination of plaintiff Thomas' neck further revealed needle marks but no surgical incision. Dr. Ferriter found no objective evidence of orthopedic disability or permanency or residuals. He diagnosed plaintiff Thomas with resolved lumbar spine sprain/strain and status post cervical spine needle procedure in March 2019, healed.

In opposition, plaintiff Thomas submitted the affirmations of an orthopedic surgeon, Jay Eneman, M.D., a physiatrist, Anam Azeem, M.D., and a radiologist, B.V. Reddy, M.D.; and medical records from Jacobi Medical Center dated February 2, 2019 and CitiMedical I, PLLC.

Dr. Azeem examined plaintiff Thomas on February 13, 2018, finding range-of-motion limitations in the cervical and lumbar spine, bilateral cervical paraspinal tenderness and that plaintiff Thomas was temporarily 50% impaired. Dr. Azeem diagnosed plaintiff Thomas with cervical sprain/whiplash and lumbar sprain. Plaintiff Thomas underwent a course of physical therapy, chiropractic treatment and acupuncture. At a May 9, 2018 follow-up examination, Dr. Azeem noted slightly greater restrictions in plaintiff Thomas' cervical and lumbar spine range of motion. After approximately one year of treatment, Dr. Azeem found that plaintiff Thomas' injuries were not improving and performed bilateral cervical C4-C5 and C5-C6 facet joint injections on March 22, 2019. Dr. Azeem's September 26, 2019 examination of plaintiff Thomas revealed ongoing cervical and lumbar spine range-of-motion limitations, despite treatment and injections. Dr. Azeem concluded that plaintiff Thomas' injuries were permanent. Dr. Azeem opined that plaintiff Thomas' cervical and lumbar spine injuries were causally related to the subject accident and that plaintiff had reached maximum medical improvement.

Dr. Reddy's review of the films from plaintiff Thomas' February 19, 2018 MRIs of her cervical and lumbar spine revealed cervical spine disc bulges with encroachment and lumbar spine disc bulges with nerve root impingement.

Plaintiff Thomas' expert reports, contemporaneous medical records and positive MRI findings are sufficient to raise a triable issue of fact as to whether she sustained "significant" and "permanent consequential" limitations of the use of her cervical and lumbar spine as a result of the subject accident (*Jenkins v Livo Car Inc.*, 176 AD3d 568 [1st Dept 2019]; *Streety v Toure*, 173 AD3d 462, 462 [1st Dept 2019]).

With respect to plaintiff Thomas' claim of "serious injury" under the 90/180-day category, plaintiff Thomas alleges that she was confined to her bed and home and totally incapacitated for four days after the subject accident. Plaintiff Thomas testified that she was employed as an administrative assistant and missed a total of five days of work intermittently following the subject accident. Plaintiff Thomas also testified that she was never confined to her bed, but was confined to her home for one day following her injections. In terms of her daily activities, plaintiff Thomas testified that as a result of the subject accident she is unable to wash her hair, cook and perform household chores. This evidence establishes as a matter of law that plaintiff Thomas did not sustain a 90/180-day injury (*see Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512, 513 [1st Dept 2013] [90/180-day injury claim dismissed where plaintiff did not allege that she was disabled for the minimum duration necessary to state such a claim]; *Valdez v Benjamin*, 101 AD3d 622, 623 [1st Dept 2012] [plaintiff did not suffer a 90/180-day injury as a matter of law where he admitted that he returned to work two days after the accident]; *Barhak v L. Almanzar-Cespedes*, 101 AD3d 564, 565 [1st Dept 2012] [90/180-day injury claim dismissed where plaintiff lost no time from work and did not allege confinement to bed or home after the accident]). In opposition, plaintiff Thomas submits no evidence of a medically determined injury that prevented her from performing *substantially* all of her customary daily activities within the relevant period (*see Frias v Gonzalez-Vargas*, 147 AD3d at 502; *Cartha v Quin*, 50 AD3d at 530; *see also Perl v Meher*, 18 NY3d at 220; *Licari v Elliott*, 57 NY2d at 236). Dr. Azeem's conclusory opinion that plaintiff Thomas was disabled for more than 90 days immediately following the accident

fails to raise a triable issue of fact as to a 90/180-day injury in view of plaintiff's testimony that she returned to work shortly after the subject accident.

Neither plaintiff Wagstaffe nor plaintiff Thomas submitted evidence with respect to their claims of "serious injuries" based upon injuries resulting in significant disfigurement, dismemberment, fracture or a permanent loss of use, effectively abandoning these claims (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]; *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014]; *Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

Accordingly, it is

ORDERED, that the aspects of defendants' motion seeking summary judgment dismissing (1) plaintiff Wagstaffe's claims of "serious injury" under the fracture, permanent loss of use, permanent consequential limitation and significant limitation categories of Insurance Law § 5102(d) and (2) plaintiff Thomas' claims under the significant disfigurement, dismemberment, fracture, permanent loss of use and 90/180-day categories of Insurance Law § 5102(d) are granted, and these claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the March 13, 2020 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: January 16, 2020

  
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John R. Higgett, J.S.C.