

Wilson v Derosena

2026 NY Slip Op 31906(U)

April 30, 2026

Supreme Court, Kings County

Docket Number: Index No. 502328/24

Judge: Steven Z. Mostofsky

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of February, 2026.
April

P R E S E N T:

HON. STEVEN Z. MOSTOFSKY,
Justice.

-----X

TIMOTHY WILSON,

Plaintiff,

-against-

Index No.: 502328/24
Motion Sequence: 1-2

HILAIRE DEROSENA AND GENA DEROSENA,

Defendants.

-----X

The following e-filed papers read herein:
Notice of Motion, Cross- Motions, and Affirmations _____
Affirmations in Opposition _____
Affirmations in Reply _____

NYSCEF Doc Nos.:
16-21, 30-31, 22-28
38-42, 36
44, 43

Upon the following papers, defendants Hilaire Derosena (Hilaire) and Gena Derosena (Gena; collectively with Hilaire, defendants) move (in motion seq. no. 1) for summary judgment, pursuant to CPLR 3212, dismissing the complaint of plaintiff Timothy Wilson (plaintiff) on the grounds that he did not sustain a "serious injury" under Insurance Law § 5102 (d).¹

¹ A "serious injury" is defined as a personal injury which, in relevant part, results in: (1) "permanent consequential limitation of use of a body organ or member" (the permanent consequential limitation of use category); (2) "significant limitation of use of a body function or system" (the significant limitation of use category); and/or (3) "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" (the 90/180-day category).

Plaintiff moves (in motion seq. no. 2) for partial summary judgment, pursuant to CPLR 3212, on the issue of liability.

Background

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained in a motor vehicle accident that occurred on July 15, 2023 at the intersection of Flatlands Avenue and East 76th Street in Brooklyn, New York, when the vehicle driven by plaintiff and the vehicle operated by defendant Gena (and owned by defendant Hilaire) collided at the approximately 90-degree angle (the accident).

Plaintiff alleges in his bill of particulars that he sustained two injuries in the accident; namely: (1) the lumbar spine injuries, including the posterior disc herniation impinging on the thecal sac at the L5-S1 level, as well as the right L4-5 lumbar radiculopathy (collectively, the lumbar spine injuries); and (2) the cervical spine injuries, including disc desiccation at the C5-C6 level and the right C5-6 cervical radiculopathy (collectively, the cervical spine injuries). Plaintiff further alleges that his lumbar spine and cervical spine injuries (individually and collectively) meet the serious injury threshold requirements of Insurance Law § 5102 (d) in one or more of the following categories: (1) the permanent consequential limitation of use; (2) a significant limitation of use; and (3) the 90/180-day category.

Defendants' Motion (Seq. No. 1)

In support of their motion, defendants proffer, among other evidence: (1) the September 24, 2024 affirmed medical report of Alexandra Carrer, M.D., a board-certified orthopedic surgeon (the defense expert orthopedist) (NY St Cts Elec Filing [NYSCEF] Doc

No. 21); (2) the March 26, 2025 affirmed medical report of Scott S. Coyne, M.D., a board-certified radiologist (the defense expert radiologist) (NYSCEF Doc No. 31); and (3) plaintiff's deposition testimony (NYSCEF Doc Nos. 20, 21, and 30, respectively).

According to her September 24, 2024 report, the defense expert orthopedist examined plaintiff on that day and reviewed plaintiff's prior medical records. The defense expert orthopedist noted that plaintiff went to an urgent care walk-in clinic after the accident; that he had received physical therapy, acupuncture treatment and massage therapy; and that he received a cortisone injection on an unspecified date. At the defense expert orthopedist's IME of plaintiff, plaintiff indicated his pain level was on the scale of 5 out of 10 in both his cervical and lumbar regions of his spine. The defense expert orthopedist performed range of motion testing by using a goniometer which indicated a full range of motion in plaintiff's cervical and lumbar regions of his spine, with no tenderness or spasms elicited on examination. The defense expert orthopedist concluded that plaintiff's cervical spine sprain and his thoracolumbar spine sprain had both resolved.

According to his March 26, 2025 report, the defense expert radiologist reviewed the July 25, 2023 MRI film of plaintiff's lumbosacral spine (but not a separate MRI film of plaintiff's cervical spine), together with the radiology records. The defense expert radiologist opined that: (1) the lumbosacral spine demonstrated no osseous, soft tissue abnormality, trauma or other pathology causally related to the accident; (2) there were no fractures, contusions, dislocations, or other traumas; (3) there was no evidence of focal disc extrusion, discogenic trauma, or cauda equina displacement at any lumbosacral level; and (4) there was no swelling, edema, or other paraspinal soft tissue trauma, in each instance,

as relevant to plaintiff's lumbosacral spine. According to the defense expert radiologist, the MRI film of plaintiff's lumbosacral spine revealed the focally advanced L5-S1 degenerative disc and facet joint changes, which were chronic, long-standing, preexistent, and causally unrelated to the accident.

Next, defendants contend that plaintiff fails to qualify for the permanent consequential and significant limitation of use categories based on his deposition testimony that he is only limited with respect to bringing in groceries, lifting things and carrying up the laundry. According to defendants, plaintiff's limitations in performing recreational and household activities are insufficient to qualify for the above categories.

In addition, defendants argue that plaintiff fails to qualify for the 90/180-day category based on his deposition testimony that he was not confined to bed and/or home as result of the accident. Lastly, defendants contend that there was a gap in treatment that is fatal to plaintiff's claims, citing to plaintiff's testimony that he stopped all accident-related treatment in February 2024 when his physician told him he was progressing well and that physical therapy was no longer needed.

In opposition, plaintiff contends that defendants have failed their *prima facie* burden on the serious injury threshold. With respect to the defense expert orthopedist, plaintiff points out that the former examined him approximately fourteen months after the accident. In addition, as was indicated in the defense expert orthopedist's report, at the time of the IME, plaintiff complained to him of neck and low-back pain; he reported difficulties reaching, bending, sleeping and lifting; and that he rated his pain on the scale of 5 out of 10. Plaintiff maintains that his complaints of neck and lower back pain contradict the

defense expert orthopedist's findings of a full range of motion in the cervical and lumbar regions of his spine.

With respect to the defense expert radiologist, plaintiff points out that the former only reviewed the July 25, 2023 lumbar spine MRI film, and failed to review plaintiff's June 5, 2023 cervical spine MRI film. Plaintiff argues that the defense expert radiologist's failure to review both MRI films was insufficient to meet defendants' initial burden to establish *prima facie* entitlement to judgment as a matter of law.

Plaintiff also argues that, even if the court finds that defendants met their *prima facie* burden, a triable issue of fact exists as to whether he suffered a serious injury, at least in the cervical region of his spine. In support, plaintiff relies on: (1) certified urgent care records, treatment records, and MRI reports; (2), the affirmed reports of Ali E. Guy, M.D., a board-certified physiatrist, dated April 1, 2025 and May 10, 2025 (plaintiff's expert physiatrist), and (3) his own deposition testimony (NYSCEF Doc Nos. 39-41, 42, and 20, respectively).

Plaintiff highlights his deposition testimony that he began physical therapy on July 18, 2023 (three days after the accident) at Spinal Zone Chiropractic, and underwent continuous therapy, which included chiropractic treatment, physical therapy and acupuncture, approximately four times per week from July 2023 to February 2024, for a total of 99 treatment sessions. Plaintiff explained that, because of his persistent complaints of pain and the failure of conservative care and injections to resolve his lower back pain plaintiff was offered, on October 23, 2023, lumbar discectomy surgery, but he declined.

Plaintiff testified he stopped treatment in February 2024 when his treating physician stated to him that he had reached the maximum medical benefit from treatment.

Plaintiff also refers to the following: (1) a June 5, 2023 MRI report of his cervical spine, which report revealed disc desiccation at the C5-C6 level; (2) an August 8, 2023 MRI report of his lumbar spine, which report revealed disc herniation impinging on the thecal sac at the L5-S1 level; and (3) an August 28, 2023 EMG/NCV testing of his upper and lower extremities, which testing revealed C5-6 radiculopathy and L4-5 radiculopathy. Plaintiff also notes that he received two lumbar epidural steroid injections, one on September 20, 2023 and the other on November 19, 2023, as well as a cervical epidural steroid injection on October 11, 2023.

Lastly, plaintiff relies on the April 1, 2025 and May 10, 2025 reports of his expert physiatrist, with the May 10, 2025 report itemizing the medical records of plaintiff that the physiatrist reviewed. At his April 1, 2025 IME examination, plaintiff complained of localized neck pain and back pain, with a reported pain level on the scale of 7-8 out of 10. His expert physiatrist indicated that his neck and low back had diffuse tenderness, with diffuse moderate spasm and multiple trigger points present. Plaintiff's expert physiatrist performed a range of motion testing (ROM) with the use of a goniometer, which revealed the following ROM impairments:

Cervical Spine:

ROM test	Plaintiff	Normal	% of impairment
Lateral Flexion	35 degrees	45 degrees	23%
Lateral Rotation	60 degrees	80 degrees	25%

Flexion	45 degrees	60 degrees	25%
Extension	45 degrees	60 degrees	25%

Lumbar Spine:

ROM test	Plaintiff	Normal	% of impairment
Extension	20 degrees	30 degrees	33%
Flexion	70 degrees	90 degrees	23%
Bilateral Flexion	20 degrees	30 degrees	33%
Lateral Rotation	20 degrees	30 degrees	33%
SLR (Straight Leg Raise)	70 degrees	90 degrees	23%

Based on his physical examination of plaintiff and a review of the medical records, plaintiff's expert physiatrist diagnosed him with C3-C4, C4-C5, C5-C6 and C6-C7 disc protrusions, cervical radiculopathy, lumbar myofasciitis (inflammation or irritation of muscles and fascia, also known as traumatic myofascial pain syndrome), and multiple spine-related traumatic injuries. Plaintiff's expert physiatrist opined that his injuries were permanent and progressive; that he would need periodic medical supervision, physical therapy treatments, trigger point injections, and screening MRIs of the cervical and lumbar regions of his spine. Plaintiff's expert concluded that plaintiff sustained a serious injury that was causally related to the accident.

In reply, defendants contend that plaintiff's medical records should be disregarded as not properly authenticated. Further, with respect to the MRI reports of the cervical and lumbar spine regions of plaintiff's spine, defendants argue that the mere existence of a

bulging or herniated disc is not (in and of itself) evidence of a serious injury where, as here, there is no objective evidence of the extent and duration of plaintiff's physical limitations.

Discussion

To succeed on a motion for summary judgment, the movant must demonstrate a *prima facie* showing of entitlement to judgment as a matter of law, proffering evidence in admissible form to support the claim that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a *prima facie* showing requires the denial of the motion (*see Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Once a *prima facie* showing has been established, the burden shifts to the opposing party to establish a material issue of fact (*see Alvarez* 68 NY2d at 324; *Kaufman v Silver*, 90 NY2d 204, 208 [1997]). The court must view the evidence in the light most favorable to the opponent of the motion and must give that party the benefit of every favorable inference (*see Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]; *Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact and the movant is entitled to judgment as a matter of law (*see Andre v Pomeroy*, 35 NY2d 261 [1974]).

To make a *prima facie* case that plaintiff has not suffered a serious injury proximately resulting from the underlying accident, defendants must rule out each of the "serious injury" categories asserted in plaintiff's bill of particulars and must further establish that plaintiff's alleged injuries did not proximately result from the underlying accident (*see Santos v Fiktus*, 232 AD3d 698 [2d Dept 2024]). As noted, plaintiff alleged

that his accident-related injuries fall into one or more of the following categories: (1) a permanent consequential limitation of use; (2) a significant limitation of use, and (3) a 90/180-day category.

Defendants, by way of the affirmed reports of their defense experts, established, prima facie that plaintiff did not suffer any injuries to the cervical and lumbar spine regions of his spine under the permanent consequential and significant limitation of use categories (see *Toure v Avis Rent A Car Sys., Inc.*, 98 NY3d 345 [2002]; *Gaddy v Eyster*, 79 NY2d 955 [1992]). Specifically, the defense expert orthopedist found plaintiff to have a full range of motion, no disability, and resolved cervical and lumbar sprains/strains. In addition, based on the defense radiologist's review of plaintiff's July 25, 2023 lumbosacral spine MRI film, he determined that plaintiff had advanced L5-S1 degenerative disc and facet joint changes that were chronic, long-standing, pre-existent, and causally unrelated to the accident. Further, plaintiff's pretrial testimony established, prima facie, that he did not sustain a serious injury in the 90/180-day category. Accordingly, defendants demonstrated, prima facie, that plaintiff did not sustain a serious injury under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of Insurance Law § 5102 (d) (see *Holliday v City of New Rochelle*, 243 AD3d 648, 649 [2d Dept 2025]; *Zanni v Knutson*, 211 AD3d 994, 995 [2d Dept 2022]).

In opposition, however, plaintiff raised a triable issue of fact as to whether he sustained serious injuries to the cervical region of his spine under the permanent consequential limitation of use and significant limitation of use categories of Insurance

Law § 5102 (d) (*see Paulson v Irmgard*, 241 AD3d 1483, 1484 [2d Dept 2025]; *Martinez v New York City Transit Authority*, 212 AD3d 724, 725 [2d Dept 2023]; *Niciforo v Orellana*, 212 AD3d 642 [2d Dept 2023]; *Novembre v Punnoose*, 211 AD3d 961, 963 [2d Dept 2022]). Further, as the defense expert orthopedist determined that the alleged injuries to the cervical (as well as lumbar) regions of the plaintiff's spine were caused by the accident,² the burden never shifted to plaintiff to raise an issue of fact regarding causation, or to explain any gap in treatment (*see Niciforo*, 212 AD3d at 642-643; *Martinez*, 212 AD3d at 725; *Novembre*, 211 AD3d at 963). Because plaintiff raised triable issues of fact as to whether he sustained serious injuries to the cervical region of his spine under the permanent consequential limitation of use and significant limitation of use categories, it is unnecessary for this Court to determine whether plaintiff's other alleged injuries (*i.e.*, those to the lumbar region of his spine) met the "no fault" threshold (*see Santos v Fiktus*, 232 AD3d 698, 699 [2d Dept 2024]).³ Accordingly, defendants' motion is denied.

Plaintiff's Motion (Seq. No. 2)

Plaintiff seeks summary judgment as to liability on the grounds that defendants failed to yield to him the right of way before making an improper left turn out of a parking lot in violation of Vehicle and Traffic Law (VTL) §§ 1141 and 1143. Further, plaintiff argues that defendants' negligence is established by Gona's failure, before the accident, to

² See Defense Expert Orthopedist's Affirmed Report, dated September 24, 2024, page 4, averring that her diagnoses were "causally related to the accident" (NYSCEF Doc No. 21).

³ Contrary to defendants' contention, the lack of proper certification for plaintiff's physical therapy records from all facilities and for his EMG report does not preclude their admissibility because the defense orthopedic expert relied on those records and the EMG report to render her own opinion (*see Kearse v New York City Transit Authority*, 789 NYS2d 281 [2d Dept 2005]).

observe plaintiff's vehicle with the right of way in its lane of travel. In the event the Court finds that plaintiff is entitled to summary judgment on the issue of liability against defendants, plaintiff argues that the issue of plaintiff's comparative fault for the accident should be determined by the trier of fact at the time of trial. In support of his motion, plaintiff refers to his deposition testimony and that of Gena (NYSCEF Doc Nos. 25 and 26, respectively).

Plaintiff testified that, before the accident, he was traveling on Flatlands Avenue at the speed of under twenty miles per hour and had made a right turn onto East 76th Street; there is a McDonald's located on the corner of Flatlands Avenue and East 76th Street. Plaintiff identified East 76th Street as a two-way street, with one lane of travel for the direction plaintiff was traveling and two lanes of travel for vehicles traveling in the opposite direction. According to plaintiff's testimony, he became aware (after the accident) that defendants' vehicle was exiting the McDonald's parking lot, attempting to cut across the two opposite lanes of travel and a double yellow line, and to make a left turn into his lane of travel on East 76th Street. Plaintiff stated that the front driver's side of his vehicle was heavily damaged in the accident, resulting in his insurance carrier's declaration that his vehicle was a total loss.

According to Gena's testimony, at the time of the collision, she was driving the vehicle owned by her father, Hilaire, at the speed of under twenty miles per hour and that the accident happened when she attempted to make a left turn out of the McDonald's parking lot. Gena testified that, as she was pulling out of the parking lot, she had a clear view of the vehicles that were stopped to her right as she was attempting to exit the parking

lot and execute a left-hand turn. In her pretrial testimony, Gena conceded that she cut across two lanes of travel and a double yellow line, while attempting to execute a left-hand turn. Gena further stated that she never observed plaintiff's vehicle before the impact. She testified that there was nothing obstructing her view of the roadway, and that somewhere between 30-60 seconds passed from the time she last looked to her right to the time of the collision. Gena also testified that, approximately two seconds before the accident, she was looking ahead, but she still did not observe plaintiff's vehicle before the impact. Gena stated that the front passenger side of defendants' vehicle was damaged in the accident.

In opposition, defendants argue that there are factual issues which require denial of plaintiff's motion; specifically, whether plaintiff was negligent in failing to observe Gena's vehicle prior to the accident, and whether plaintiff violated the duty to operate his vehicle with reasonable care. They contend that Gena was not responsible for causing the accident. In support, they cite to her pretrial testimony to the effect that she had a clear view to her right before attempting a left turn, and that she fully completed her left turn when the accident occurred. According to defendants, plaintiff (on his own and independently of defendants' actions/omissions) had a duty to see that which, through the proper use of his senses, he should have seen.

A plaintiff in a negligence action moving for summary judgment on the issue of liability is required to establish that the defendant breached a duty owed to the plaintiff and that defendant's negligence was a proximate cause of plaintiff's alleged injuries (*see Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2d Dept 2018]). a plaintiff must demonstrate that the accident was proximately caused by negligent conduct

by the defendant in operating his or her motor vehicle (*see Howell v RS Cab Corp.*, 63 AD3d 1002, 1002 [2d Dept 2009]). To be entitled to summary judgment, a plaintiff does not bear the burden of establishing the absence of his or her own comparative fault (*see Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]).

As noted, plaintiff moves for partial summary judgment on the issue of liability for defendants' alleged violation of VTL §§ 1141 and 1143. A VTL violation is negligence as a matter of law (*see Salama v Piccirillo*, 223 AD3d 692, 693 [2d Dept 2024]; *Vainer v DiSalvo*, 79 AD3d 1023, 1024 [2010]). Under VTL § 1141, the driver of a vehicle intending to turn left "shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." Further, under VTL § 1143, the driver of a vehicle intending "to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed." "A driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way" (*Estate of Cook v Gomez*, 138 AD3d 675, 677 [2d Dept 2016]; *see also Hand v Ridge Volunteer Fire Dept., Inc.*, 216 AD3d 923, 934 [2d Dept 2023]).

Plaintiff demonstrated his *prima facie* entitlement to judgment as a matter of law, through plaintiff's and Gena's respective pretrial testimony, which established that Gena violated: (1) VTL § 1141 - - when she made a left turn directly into the path of plaintiff's vehicle as it legally proceeded with the right of way, and (2) VTL § 1143 - - when she failed to yield the right of way to plaintiff's vehicle. As noted, Gena conceded she never

observed plaintiff's vehicle before she cut across two lanes of traffic and a double yellow line before turning left onto East 76th Street. Accordingly, Gena was negligent as a matter of law in failing to see that which, under the circumstances, she should have seen, and when it was hazardous to do so (*see Cancelleno v Johnston*, 264 AD2d 405, 406 [2d Dept 1999]). Inasmuch as plaintiff had the right-of-way, he was entitled to anticipate that Gena would obey traffic laws which required her to yield to his vehicle (*see Cenovski v Lee*, 266 AD2d 424 [2d Dept 1999]).

Defendants' attempt to invoke comparative negligence on plaintiff's part is unavailing. Plaintiff was entitled to assume that other drivers would obey traffic laws and yield as required to his vehicle. The Second Judicial Department consistently held that a driver lawfully proceeding with the right-of-way is not required to anticipate improper or unlawful conduct by others (*see Laurent v Bass*, 177 AD3d 724, 725 [2d Dept 2019]; *Shvydkaya v Park Ave. BMW Acura Motor Corp.*, 172 AD3d 1130, 1131-1132 [2d Dept 2019]). "Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*Yelder v Walters*, 64 AD3d 762, 764 [2d Dept 2009] [internal citations omitted]; *see Hand*, 216 AD3d at 924). Defendants' contention that plaintiff "should have seen" Gena's vehicle cutting across the two lanes of traffic and a double yellow line is speculative and without any evidentiary support (*see Canales v Arichabala*, 123 AD3d 869, 871 [2d Dept 2014]; *Bullock v Calabretta*, 119 AD3d 884, 885 [2d Dept 2014]). Accordingly, plaintiff's motion is granted.

The parties' remaining contentions are either unavailing or moot in light of its determination. All relief not expressly granted herein is denied.

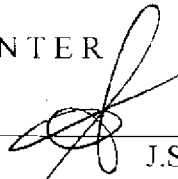
Conclusion

Accordingly, it is

ORDERED that defendants' motion (mot. seq. no. 1) is denied; and it is further

ORDERED that plaintiff's motion (seq. no. 2) for partial summary judgment on the issue of liability is granted.

This constitutes the decision and order of the Court.

ENTER


J.S.C.

Hon. Steven Z. Mostofsky
Justice, Supreme Court