

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH A. DE MARO

Justice

----- TRIAL/IAS, PART 8
NASSAU COUNTY

LISEL NEBER,

Plaintiff,

MOTION DATE:
February 18, 2003
INDEX No. 8294/01

-against-

SEQUENCE No. 2, 3
ACTION No. 1

DANIEL SEBBER, JAMES SEBBER and EILEEN
SEBBER a/k/a EILLEEN SEBBER,

Defendants.

DOROTHY FREIN,

Plaintiff,

-against-

Index No. 10135/00

JAMES SEBBER and DANIEL SEBBER,

ACTION No. 2
SEQUENCE No. 2, 3

Defendants.

The following papers read on this motion:

Notice of Motion and Supporting Papers
Notice of Motion and Supporting Papers
Notice of Cross Motion and Supporting Papers
Affirmation in Reply and in Further Support
Reply Affirmation in Support of Cross-Motion and Affirmation
in Opposition to Cross-Motion

Motions by plaintiff Neber in Action #1, and plaintiff Frein in Action #2, for summary judgment on the issue of liability against defendants is granted.

Cross-motion by the Sebber defendants in Action #2, for summary judgment dismissing the complaint therein on the grounds that plaintiff Frein has not sustained the requisite "serious injury," is denied.

These two actions arise out of a rear-end collision that took place on August 13th, 1998, at approximately 4:45 PM. The vehicle driven by defendant Daniel Sebber collided with the vehicle driven by plaintiff Lisel Neber. The Neber vehicle was stopped at a stop sign. Plaintiff Frein was a passenger in the Neber vehicle. At his deposition defendant Sebber testified, "When I saw her stopped, it was basically - I was maybe two feet away. I actually - yes. I didn't have time to react to - I

wasn't anticipating that she would be right there." (Daniel Sebber transcript, p.27).

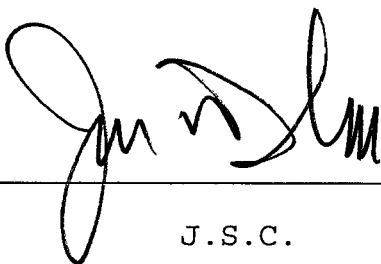
A rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle, imposing a duty of explanation on the operator of the moving vehicle. Doodnauth v Catholic Medical Center of Brooklyn and Queens, Inc., 297 AD2d 781; Shamah v Richmond County Ambulance Service, Inc., 279 AD2d 564. Vehicle stops which are foreseeable under the prevailing conditions must be anticipated by the driver who follows, because he or she is under a duty pursuant to Vehicle and Traffic Law §1129(a) to maintain a safe distance between his or her car and the car ahead. Barberena v Budd Enterprises, Ltd., 299 AD2d 305. Conclusory assertions of a sudden and unexpected stop are insufficient to rebut the inference of negligence. Shamah, supra; Myrie v Atehortua, 275 AD2d 699; Longhito v Klein, 273 AD2d 281. Under the circumstances of this case, the defendant driver's testimony was insufficient to rebut the inference of negligence arising from the rear-end collision. Accordingly, the motions by both plaintiffs for summary judgment on the issue of liability must be granted.

Defendants cross-move for summary judgment dismissing plaintiff's Frein's action on the grounds that she did not suffer a "serious injury" within the meaning of Insurance Law §5102(d). In support of their request they submit affirmed reports from an orthopedist, Dr. Zolan, and a neurologist, Dr. Rosenn, who

conclude, respectively, that Frein suffers from no current orthopedic or neurologic disability. For the record the court has not considered the report of defendants' radiologist, Dr. Macy, as that report is not properly sworn or affirmed. Pagano v Kingsbury, 182 AD2d 268. Nevertheless, the Zolan and Rosenn reports establish a prima facie case that plaintiff Frein's injuries are not "serious", and the burden shifts to plaintiff Frein to come forward with some evidence of a "serious injury" in order to survive the cross-motion. Gaddy v Eyler, 79 NY2d 955, 957.

Plaintiff Frein meets that burden with the affidavit of her neurologist, Dr. Jordan, who appears to also be certified in MRI by the American Society of Neuroimaging. Dr. Jordan states that he has compared an old MRI of the cervical spine from 1991 to a newer MRI after August 13th, 1998, which shows new herniations as follows: Right lateral herniated nucleus pulposus at C4-C5 and C7-T1, and central herniated nucleus pulposus C3-C4. Dr. Jordan further has compared an old MRI of the lumbar spine from 1995 with new scans that show new L2-3 and L5-S1 disk herniations. He opines that plaintiff Frein suffers from cervical and lumbar radiculopathy as well as new disc changes, as a result of the accident on August 13, 1998, and that she will need repeat nerve blocks for the remainder of her life. He finds that more than four years after the accident she still cannot perform stooping, lifting, bending and vigorous physical activity and he describes her injuries as permanent. Overall, on this record, plaintiff

has raised a triable issue of fact as to whether she has sustained a "serious injury" as a result of the subject automobile collision. See generally Toure v Avis Rent a Car Systems, Inc., 98 NY2d 345. For the record, the conflicting medical proof submitted by plaintiff and defendants presents issues of credibility for the jury. Kaplan v Gak, 259 AD2d 736. Based on the foregoing, the cross-motion by defendants is denied.



J.S.C.

Dated: April 30, 2003

ENTERED

MAY 12 2003

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**