

SCAW

SHORT FORM ORDER

MOD

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

JASON H. WISSEL,

TRIAL/IAS PART 13

Plaintiff(s),

INDEX NO. 228/05

- against -

MOTION SEQUENCE
NO. 1 & 2 & 3

HOWARD R. WALTER, JOANNE L. GROSBERGER,
JOSEPH J. NOTO and ANDREA F. NOTO,

MOTION SUBMISSION
DATE: May 15, 2006

Defendant(s).

The following papers read on this motion:

Notice of Motion	XX
Notice of Cross Motion	X
Reply Affirmation	X
Affirmation in Support	X

Upon the foregoing papers, the motion by the defendant Howard R. Walter for an Order granting summary judgment in favor of the Defendant, Howard R., Walter, pursuant to CPLR 3212 on the grounds that no triable issues of fact exist and/or dismissing the complaint of the Plaintiff, as well as any and all cross-claims pursuant to CPLR 3211(a)(7), in that it fails to state a cause of action as against Defendant Howard R. Walter; awarding costs and attorneys fees to the moving party pursuant to CPLR 8303(a); the motion by the defendant Joanne L. Grosberger for an Order granting the defendant Joanne L. Grosberger summary judgment pursuant to CPLR 3212 dismissing the complaint the basis that the defendant vehicle was stopped when it was struck in the rear and the cross-motion by the defendants Joseph H. Noto and Andrea F. Noto (hereinafter referred to as the defendants Noto) for an Order pursuant to CPLR 3212 granting summary judgment to defendants, Joseph J. Noto and Andrea F. Noto, based on plaintiff's failure to meet the no-fault serious injury threshold, are all determined as hereinafter provided:

The Court initially observes that by correspondence dated March 9, 2006, the plaintiff has advised the Court that the plaintiff has discontinued the action with prejudice against the defendants Howard R. Walter and Joanne L. Grosberger.

This personal injury action arises out of a four car accident that occurred on August 2, 2002 at approximately 12:10 pm on Ocean Avenue at Vincent Place, East Rockaway, NY.

The plaintiff in the plaintiff's Verified Bill of Particulars, amongst other things, sets forth:

"3. The plaintiff, Jason H. Wissel, sustained the following personal injuries as a result of the accident.

- Cervical herniated disc C3-4
- Cervical derangement and right radiculopathy
- Central posterior ridging C6-7
- Intensity consistent with degenerative disc at C6-7
- Median nerve neuropraxia, right hand
- Ulnar nerve neuropraxia of the right hand
- Atrophy in the thenar muscles of the right hand
- Paresthesia radiating down to the right hand with decreased sensation in the fourth and fifth fingers of the right hand
- Persistent neck pain with radiation down to the right shoulder and all the way to the right
- Thoracic region pain, stiffness and spasm, unable to perform daily activities
- Tenderness of the cervical paraspinals
- Spasm of the cervical spine extending from suboccipital region to the paraspinal to trapezius and interscapular region
- Decreased and painful extension of the cervical spine with pain in the sternocleidomastoid muscle and trigger point spasm
- Atrophy in the vertebral border of the right trapezius
- Positive Tinel's sign over the transverse carpal ligament and median nerve of the right hand
- Pain in the right elbow and medial epicondyle
- Pain and swelling about the right elbow
- Positive Tinel's sign over Guyon's canal

Based on plaintiff's symptomology, medical testing, and examinations, the injured and weakened areas may be predisposed to aggravation and acceleration.

The plaintiff was prescribed Flexeril and Bextra for his extreme pain and discomfort.

Regarding the cervical spine, the plaintiff sustained a permanent Orthopaedic disability as indicated by MRI studies which revealed a herniated disc with cord impingement. In association there is clinical evidence of cervical nerve radiculopathy with spasm, guarding, radiation with spasm, guarding, radiation in the posterior shoulder girdle. With disc and nerve involvement he has sustained a painful functional or restriction of motion by more than 30% based upon objective findings.

Regarding the right wrist and arm, the plaintiff sustained a permanent Orthopaedic disability demonstrated by clinical evidence of the median nerve injury with paresthesias and atrophy present in the right hand.

The aforesaid injuries to the plaintiff will be permanent, and as a result thereof, he will have permanent pain, discomfort, limitation of motion, limitation and loss of function, power and use, stiffness, irritation, tenderness and soreness to and about the aforesaid injured parts and areas.

That the foregoing injuries directly affected the skin, bones, tendons, tissues, nerves, muscles, joints, blood vessels and ligaments of the injured parts, produced functional and organic disturbances, sympathetic and radiating to and about the adjacent and surrounding areas, as well as tissue damage.

Plaintiff has pain, discomfort, limitation of motion, limitation and loss of function, power and use to and about these areas, and use of said regions and areas causes aches and pains. The areas are sensitive to pressure, palpation, sudden twist, and manipulation, and use of these areas cause tiredness and fatigue.

The injuries to the aforesaid areas and to the adjacent and surrounding regions herein above mentioned, and each of the effects of these injuries as herein above mentioned, and each of the effects of these injuries as herein above mentioned are permanent.

As a result of the accident, plaintiff's quality of life has been severely compromised. He cannot return to, nor is it expected that he will ever return to a level of function consistent with his abilities prior to the accident and he has suffered loss of the enjoyment of life.

The aforesaid injuries and the affects of same have caused this plaintiff to sustain permanent partial disability.

All of the aforementioned injuries and/or their sequelae are claimed to be permanent, except those of a superficial nature.

The plaintiff sustained the following permanent injuries as a result of the accident:

- Cervical herniated disc C3-4
- Cervical derangement and right radiculopathy
- Central derangement and right radiculopathy
- Central posterior ridging C6-7
- Intensity consistent with degenerative disc at C6-7
- Median nerve neuropraxia, right hand
- Ulnar nerve neuropraxia of the right hand
- Atrophy in the thenar muscles of the right hand
- Paresthesis radiating down to the right hand with decreased sensation in the fourth and fifth fingers of the right hand
- Tenderness of the cervical paraspinals
- Decreased and painful extension of the cervical spine with pain in the sternocleidomastoid muscle and trigger point spasm."

The defendants' Note in support of said defendants' application submit amongst other things, an affirmed letter report dated December 15, 2005 of Leon Sultan, MD, an orthopedist of an orthopedic examination of the plaintiff conducted on December 15, 2005; the August 2, 2002 emergency department record of South Nassau Communities Hospital of the plaintiff; an affirmed letter report dated December 13, 2005 of Neurological Specialties of Long Island, LLP; by Itzhak C. Haimovic, MD, a neurologist of a neurological examination of the plaintiff conducted on December 8, 2005; the September 26, 2005 deposition transcript of the plaintiff; an affirmed letter report dated October 29, 2002 of Philip Lewis, DO an orthopedist of an orthopedic examination of the plaintiff conducted on October 29, 2002 and an affirmed letter report dated October 29, 2002 of Steven Iscowitz, a chiropractor of an examination of the plaintiff conducted on October 29, 2002.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (see *Licaro v. Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; *Palmer v. Amaker*, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; *Tipping-Cestari v. Kilhenny*, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; *Wright v. Melendez*, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) 'Serious injury' means 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."

In pertinent part, Dr. Sultan in his report of examination sets forth:

"CERVICAL SPINE EXAMINATION: His head is centered on the shoulders, the shoulders are level. The cervical curvature is intact. I detect no active paracervical muscle spasm. There are no trigger points on palpation over the trapezius musculature. Cervical spine extension is to 30 degrees (normal 25-35 degrees), flexion is to 45 degrees (normal 40-50 degrees), right and left rotation is to 55 degrees (normal 45-60 degrees), right and left lateral tilt is to 25 degrees (normal 20-30 degrees). Biceps and triceps reflexes are symmetrically dull. Sensory testing of both upper extremities is normal. He is noted to have wrist ecchymotic discoloration involving both forearms secondary to a recent fall. Grip strength is firm on both sides, pinch mechanism is intact bilaterally. Both upper arms measure 17" circumference. The right forearm measures 13" circumference compared to 12-3/4" circumference on the left non-dominant side. He demonstrates a negative Tinel's test on percussion over both medial elbows and both wrists and a negative Phalen's test bilaterally. There is no intrinsic muscle atrophy involving either hand and there are no trophic changes involving the skin or nails.

DISCUSSION: Today's orthopedic and orthopedic neurological examination in regard to this gentleman's cervical spine and both upper extremities reveals that he is orthopedically stable and neurologically intact. Clinically, I cannot confirm any ongoing disability or post-traumatic orthopedic or neurological impairment in regard to the occurrence of 8/2/02. From a clinical point of view, there is no correlation between today's examination and the above - described cervical spine MRI reading or any claim of upper extremity neurological involvement."

Dr. Haimovic in said physician's report of neurological examination states:

"NEUROLOGICAL EXAMINATION: Blood pressure 132/82. Pulse 72. Respirations 14. Patient is alert in no distress. HEENT shows no abnormalities. Funduscopic examination bilateral retinal examination reveals normal color, contour. Cardiovascular: No murmurs audible. Peripheral Vascular System: No abnormalities and no edema. Carotid pulses 2+, no bruits noted.

Higher integrative functions: Alert, attentive, oriented without receptive or expressive speech difficulties. Memory intact. Fund of knowledge intact.

Gait and station: The patient could walk on heels, toes and tandem without abnormalities.

Cranial nerves: The patient could smell bilaterally. Visual fields were full, discs were flat. EOM's were full, pupils were 3/3, regular and reactive to light

and accommodation. No nystagmus was noted. Corneals were brisk bilaterally. Muscles of facial expression were full. Hearing was intact to whispers bilaterally. Tongue was midline without atrophy or fasciculation. Palate elevated symmetrically. Shoulder shrug normal.

Motor: 5/5 strength throughout without evidence for atrophy, faciculation or muscle tone change. Deep tendon reflexes are 1+ throughout. Plantar responses were flexor bilaterally. There is no evidence for hyperthenar atrophy, sensory loss or any weakness in the distribution of the median or ulnar nerve bilaterally.

Sensory: Without deficit to pinprick, light touch or proprioception.

Coordination: Normal finger-nose-finger, heel-knee-shin and rapid alternating movement.

IMPRESSION: At present there is no evidence for any weakness, numbness, loss of sensation or loss of function to suggest the possibility of cervical radiculopathy, median or ulnar neuropathy. In addition the patient is not receiving any active treatment by any physician regarding the above injury. I believe there is no sequela from the motor vehicle accident which occurred on August 2, 2002. I also believe the patient has no indication on examination of ulnar or median neuropathy or cervical radiculopathy with a completely normal examination. He does not require additional physical therapy, medical therapy or surgical therapy for his symptoms. In addition he is not taking any medications for the above symptoms. Furthermore, I believe the reported abnormalities on MRI of the cervical spine are not clinically relevant or related to the injury."

A review of the plaintiff's South Nassau Communities Hospital's Emergency Department's record sets forth a diagnosis of cervical sprain.

A review of the plaintiff's deposition sets forth subjective complaints of pain which are insufficient to establish a serious injury pursuant to the Insurance Law (see, **Scheer v Koubek**, 70 NY2d 678, 518 NYS2d 788).

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center**, 64 NY2d 851, 853; **Pagano v. Kingsbury**, *supra* at 694) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (see **Gaddy v. Eyler**, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; **Jean-Meku v. Berbec**, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; **Horan v. Mirando**, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995).

In opposition to the requested relief, the plaintiff, amongst other things, submits an affidavit of the plaintiff Jason A. Wissel; an affirmation of A Sohal, MD a treating physician of the plaintiff; an affirmation of Donald Goldman, MD, a treating orthopedist of the plaintiff and an affirmation of Glenn E. Schwartz, MD, a radiologist as to an MRI of the plaintiff's Cervical Spine performed on August 24, 2002.

The Court initially observes that the affirmation of Dr. Schwartz as to the MRI of the plaintiff's Cervical Spine on August 24, 2002 does not causally relate the conditions set forth in the MRI to the accident in issue (see, **Ukonu v Velazquez**, 213 AD2d 628, 624 NYS2d 195 (Second Dept., 1995)).

The Court notes that the plaintiff submits the respective affirmations of Dr. Sohal and Dr. Goldman, both treating physicians of the plaintiff. Dr. Sohal saw the plaintiff on August 16, 2002; December 30, 2004; June 9, 2005 and October 13, 2005. Dr. Goldman saw the plaintiff on September 11, 2002; October 25, 2004 and October 25, 2004. The respective physicians reference that the gap in treatment was due to the plaintiff undergoing physical therapy but the plaintiff has submitted no evidence in admissible form from a health care provider that would substantiate a routine of physical therapy. In the absence of same there is an unexplained gap in treatment (see, **Grossman v Wright**, 268 AD2d 79, 707 NYS2d 233 (Second Dept., 2000)).

A review of the plaintiff's affidavit sets forth subjective complaints of pain which are insufficient to establish a serious injury pursuant to §5102 of the Insurance Law.

Based upon the foregoing, the defendants Joseph J. Noto and Andrea F. Noto's application for an Order pursuant to CPLR 3212 granting summary judgment to defendants, Joseph J. Noto and Andrea F. Noto, based on plaintiff's failure to meet the no-fault serious injury threshold, is **granted**.

In light of the foregoing and based upon the stipulation of discontinuance, the defendant Howard R. Walter's motion for an Order granting summary judgment in favor of the Defendant, Howard R., Walter, pursuant to CPLR 3212 on the grounds that no triable issues of fact exist and/or dismissing the complaint of the Plaintiff, as well as any and all cross-claims pursuant to CPLR 3211(a)(7), in that it fails to state a cause of action as against Defendant Howard R. Walter; awarding costs and attorneys fees to the moving party pursuant to CPLR 8303(a), and the defendant Joanne L. Grossberger's motion for an Order granting the defendant Joanne L. Grosberger summary judgment pursuant to CPLR 3212 dismissing the complaint the basis that the defendant vehicle was stopped when it was struck in the rear, are both respectively **denied** as moot.

SO ORDERED.

DATED: 7/18/2006

Roy S. Malum
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ENTERED J.S.C.
JUL 21 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE