

**Scott v Zanghi**

2013 NY Slip Op 30544(U)

March 18, 2013

Supreme Court, Wyoming County

Docket Number: 42341

Judge: Mark H. Dadd

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At a term of the Supreme Court held in and for the County of Wyoming, at the Court-house in Warsaw, New York, on the 18<sup>th</sup> day of March, 2013.

PRESENT: HONORABLE MARK H. DADD  
Acting Supreme Court Justice

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF WYOMING

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LORRAINE L. SCOTT and  
WALTER SCOTT *Plaintiffs*

v.

THOMAS J. ZANGHI  
*Defendant*

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ORDER

Index No. 42341

Defendant having moved by notice of motion dated August 30, 2012, for an order pursuant to CPLR 3212 directing that summary judgment be entered herein in his favor dismissing the complaint on the grounds that the action, to the extent that it seeks recovery for non-economic loss, is barred by Insurance Law §5104 because the plaintiff, Lorraine L. Scott, did not suffer a serious injury, and said motion having duly come on to be heard.

NOW, upon reading the pleadings of the parties, and on reading and filing the notice of motion dated August 30, 2012, supported by the affidavit of Alison M. K. Lee, Esq., sworn to on August 28, 2012, together with the annexed exhibits and memorandum of law; and the opposing affirmation of Jesse B. Baldwin, Esq., dated December 12, 2012, together with the annexed exhibits and memorandum of law; and the supplemental affirmation of Jesse B. Baldwin, Esq., dated January 24, 2013, together with the annexed exhibits; and the reply affidavit of Alison M. K. Lee, Esq., sworn to on January 29, 2013, together with the annexed exhibit; and after hearing Alison M. K. Lee, Esq., attorney for the defendants, in support of the

motion and Jesse B. Baldwin, Esq., attorney for the plaintiffs, in opposition thereto, and due deliberation having been had, the following decision is rendered.

The matter arises from a motor vehicle accident that occurred on March 5, 2007, on Simmons Road in Perry, New York. The plaintiff, Lorraine L. Scott, driving her automobile on Simmons Road, collided with the defendant's pickup truck when it suddenly came sliding out of a driveway into the road in front of her. She is suing to recover for the injuries she suffered in the crash. Her husband, Walter Scott, brings a derivative action. In their Bill of Particulars dated October 13, 2010, the plaintiffs attribute to the accident the following injuries sustained by Lorraine Scott: "severe contusions of the chest and face; contusions of the neck, back head, left knee and jaw; lacerations of the upper lip, nose and scalp; post-concussive headache; blurred vision; right upper lip anesthesia; severe hearing loss of the left ear; severe tailbone pain; bilateral sacroiliac joint dysfunction; severe low back pain with radiation down the left extremity; left lateral thigh numbness; weakness in both legs; associated parathesia down her back and between her shoulders; cervical thoracic sprain/strain; lumber sprain/strain; spinal stenosis; lumbar spondylosis; and extreme aggravation and exacerbation of pre-existing lumbar disc disease, including disc bulging at L3; annular bulge at L4-L5; annular bulge at L5-S1." In a supplemental Bill of Particulars dated January 10, 2012 – to which the defendant has objected – the plaintiffs also allege that Lorraine Scott has suffered "permanent nerve damage, paraplegia, and total or partial loss of use of her legs and the lower half of her body" following a "pain injection she received as a result of her spinal injuries sustained in and/or aggravated by the subject accident."

The plaintiffs claim that Lorraine Scott's injuries qualify as serious injuries as defined in Insurance Law §5102(d) under the following two injury categories: significant limitation of use of a body function or system; and 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 his motion, the defendant contends that the plaintiff did not suffer any qualifying injuries as a result of the accident and, therefore, the suit is barred by Insurance Law §5104.

The defendant bears the initial burden upon the motion to make a prima facie showing that the plaintiff sustained no serious injury attributable the accident (Gonyou v. McLaughlin, 82 A.D.3d 1626, 1627 [4<sup>th</sup> Dept., 2011]; Bulls v. Masara, 71 A.D.3d 1408, 1409 [4<sup>th</sup> Dept., 2010]). In support of the motion, the defendant submits, among other documents, the deposition testimony of Lorraine Scott, certain of her medical records, and the report of his independent medical examiner, Daniel A. Castellani, M.D. Based upon his physical examination of Mrs. Scott and his review of her records, Dr. Castellani concludes in his report that she suffered in the accident only “a facial contusion, a left occipital contusion, a chest/breast contusion and tailbone pain.” These injuries he characterizes as “all temporary and short-lived conditions.” In his opinion, “[t]here is no objective evidence the motor vehicle accident of March 5, 2007 caused a serious injury or aggravation of any preexisting spinal conditions.” Also, Dr. Castellani finds that “Mrs. Scott did not sustain a serious injury to her nervous system [. . .] as a result of the motor vehicle accident of March 2007.”

Through the submission of Dr. Castellani’s report and the other supporting papers, the defendant asserts that he has met his burden of proof upon the motion. Furthermore, he argues that the Court must grant his motion because the plaintiffs’ responding papers are deficient and fail to raise any material questions of fact.

With respect to the 90/180 day injury category, the Court agrees with defendant’s counsel that the defendant has made a prima facie showing of an entitlement to judgment. Mrs. Scott’s deposition testimony is sufficient to establish that she was not prevented from performing substantially all of her customary daily activities during the statutory period. Although she describes in her testimony how her progressively worsening symptoms have made

some of her daily activities more difficult to perform – ultimately leading her to choose to retire from her job years earlier than she had planned – it is evident that her symptoms did not greatly debilitate her during 90 of the first 180 days following the accident. Mrs. Scott admits that she returned to work within a week after the accident with no reduction in her hours or duties. She then continued to work until she retired in 2010. In response to the evidence submitted by the defendant showing that Mrs. Scott did not suffer an injury falling within the 90/180 day category, the plaintiffs have submitted nothing which raises a material issue of fact. Accordingly, the defendant's motion shall be granted with respect to that claim.

With respect to the claim of significant limitation of use injuries, the Court reaches a different conclusion. The defendant has not shown that all of the plaintiff's claimed injuries fail to qualify under this category. For instance, Dr. Castellani in his report acknowledges that "[t]here is significant loss of hearing on the left side." Also, according to Dr. Castellani, the medical records show that the Ear, Nose and Throat Specialist who treated Mrs. Scott during 2007 and 2008 "did document that her hearing loss seemed to have worsened following the motor vehicle accident." And in her deposition testimony, Mrs. Scott dates the onset of her hearing loss in the left ear to the week following the accident. Thus, the defendant's own submissions contain evidence that Mrs. Scott suffered a significant hearing loss as a result of the accident. Moreover, Dr. Castellani declines in his report to offer an opinion with regard to the cause of this hearing loss, stating that "[i]ssues related to [Mrs. Scott's] visual system, auditory system and TMJ are deferred to the appropriate specialists."

A significant hearing loss qualifies as a serious injury under the significant limitation of use injury category (see, Preston v. Young, 239 A.D.2d 729 [3<sup>rd</sup> Dept., 1997]). Since the defendant has not met his burden upon the motion to show that the plaintiff suffered no serious injuries attributable to the accident within the significant limitation of use injury category, the motion with regard to this injury category must be denied "regardless of the sufficiency of the opposing papers" (Winegrad v. New York University Medical Center, 64

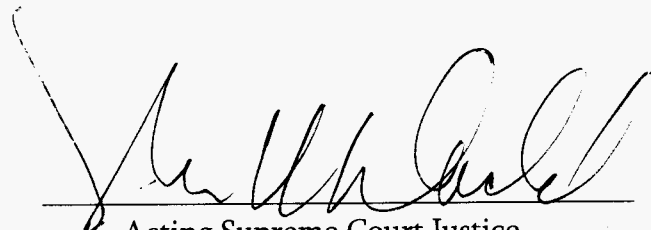
N.Y.2d 851, 853 [1985]). Having determined that the motion must be denied, it is not necessary for the Court to further examine the defendant's contention that the plaintiffs' responding papers are deficient (Brouman v. Gorokhovsky, 89 A.D.3d 660 [2<sup>nd</sup> Dept., 2011]).

NOW, THEREFORE, it is hereby

ORDERED that the plaintiffs' claim to have suffered a qualifying serious injury as defined by Insurance Law §5102(d) under the 90/180 day category is dismissed; and it is further

ORDERED that the defendant's motion for summary judgment is in all other respects denied.

Dated: March 18, 2013



Acting Supreme Court Justice

