

## In This Issue

- "Serious Injury" Threshold-Appellate Division, Fourth Department Case Synopses

## Category of Links

Find more information visit our Web page at [www.sliwa-lane.com](http://www.sliwa-lane.com)

## Contact Us

<http://www.sliwa-lane.com>

e-mail: [KLane@Sliwa-Lane.com](mailto:KLane@Sliwa-Lane.com)

phone: (716) 853-2050

fax: (716) 853-2057

\*\*NOTE\*\*

If you would like to be removed from this list, please e-mail: [NPeters@Sliwa-Lane.com](mailto:NPeters@Sliwa-Lane.com)

### **“SERIOUS INJURY” THRESHOLD – APPELLATE DIVISION, FOURTH DEPARTMENT CASE SYNOPSSES**

*Covert v Samuel* (53 AD3d 1147 [4th Dept 2008])

**No-Fault, Serious Injury – Defendants Established Prima Facie Case – Plaintiff Failed to Raise Triable Question of Fact - Injury Not Causally Related to Accident Because of Preexisting Medical Issue:** In support of her Motion for Summary Judgment on the issue of serious injury, Plaintiff offered the testimony of two surgeons. The first diagnosed Plaintiff’s degenerative condition of her cervical spine, but failed to causally link that condition to the accident in question. The second physician, however, was able to show that Plaintiff’s preexisting condition was aggravated by the accident. The Fourth Department held that this combined evidence would have been sufficient to warrant granting a Motion for Summary Judgment, except that Defendant produced contrary medical testimony that raised a triable issue of fact. Because Defendant’s expert claimed that Plaintiff’s central complaint resulted from a preexisting condition and not necessarily from the subject accident, the Court reasoned that Plaintiff failed to prove causal relation, and reversed the order granting Plaintiff’s summary judgment on that issue.

*Chmiel v Figueroa* (53 AD3d 1092 [4th Dept 2008])

**No-Fault, Serious Injury – Plaintiff Raised a Triable Question of Fact:** Defendant was granted summary judgment and a dismissal of Plaintiff’s complaint after the Supreme Court agreed that Plaintiff had failed to establish the seriousness of his injury within the meaning of Insurance Law § 5102. The Fourth Department agreed that Defendant had met her initial burden with respect to the permanent consequential limitations of use and significant limitation of use categories of serious injury by showing that Plaintiff had failed to establish a causal relation to the subject accident. The Court held, however, that Plaintiff sufficiently responded with a triable issue of fact by producing medical evidence showing that his herniated disc and loss of movement resulted directly from the surgery that was necessary following the accident. Though that part of Plaintiff’s complaint was reinstated by the Fourth Department, the Court held that Plaintiff failed to respond

## Category of Links

Find more information visit our Web page at [www.sliwa-lane.com](http://www.sliwa-lane.com)

## Contact Us

<http://www.sliwa-lane.com>

e-mail: [KLane@Sliwa-Lane.com](mailto:KLane@Sliwa-Lane.com)

phone: (716) 853-2050

fax: (716) 853-2057

**\*\*NOTE\*\***

If you would like to be removed from this list, please e-mail:

[NPeters@Sliwa-Lane.com](mailto:NPeters@Sliwa-Lane.com)

to Defendant's contention that Plaintiff was not prevented from performing substantially all of his customary activities during 90 for the first 180 days following the accident.

*Lux v Jakson* (52 AD3d 1253 [4th Dept 2008])

**No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Failed to Establish Causal Relationship:** The Fourth Department reversed an order denying summary judgment on the grounds that Plaintiff failed to meet their burden of establishing a causal link between the car accident and her injuries. Defendant had submitted his motion along with a report from a physician who concluded that there was no evidence suggesting that Plaintiff's injuries resulted from the accident, but in fact were caused by a preexisting condition. The Fourth Department noted that the burden to respond with persuasive evidence to the contrary shifted to Plaintiff, who failed to do so. In fact, Plaintiff's chiropractor did submit opposing affidavit, but it was insufficient to raise an issue of fact because it failed to address degenerative changes in the Plaintiff's injuries, or any injuries the Plaintiff had before the accident.

*Sconiers v Barber* (51 AD3d 1403 [4th Dept 2008])

**No-Fault, Serious Injury – Plaintiff Raised a Triable Question of Fact:** Supreme Court denied Defendants' Motion for Summary Judgment on the ground that Plaintiff did not sustain a serious injury. Defendants met their burden by submitting the report of a physician who concluded Plaintiff's injuries may have existed, but that they were not necessarily the result of the motor vehicle accident in question. The Fourth Department agreed with the Supreme Court ruling, holding that the Plaintiffs raised a triable issue of fact in their submission of an affirmation indicating that the accident was indeed the cause of Plaintiff's injuries. Though Defendants successfully shifted the burden to the Plaintiffs to provide evidence linking the injuries to the car accident, Plaintiff's response was sufficient to allow for a jury trial.

*Beaton v Jones* (50 AD3d 1500 [4th Dept 2008])

**No-Fault, Serious Injury – Defendant Established a Prima Facie Case – No Comparative Qualification of What is "Normal":** After a car collision, Plaintiff commenced an action claiming a number of serious injuries spanning several categories including permanent loss of use, significant limitation of use, permanent consequential limitation of use, and the 90/180 category. Defendant was granted a Motion for Summary Judgment by the Supreme Court, on the ground that Plaintiff did not actually sustain a serious injury as required by Insurance Law §5102. The Fourth Department noted that Plaintiff failed entirely to address the permanent loss of use category in his brief on appeal, and that he failed to submit evidence showing either injury or causation as is required to establish the 90/180 category of serious injury. As for the remaining two categories, Plaintiff

## Category of Links

Find more information visit our Web page at [www.sliwa-lane.com](http://www.sliwa-lane.com)

## Contact Us

<http://www.sliwa-lane.com>

e-mail: [KLane@Sliwa-Lane.com](mailto:KLane@Sliwa-Lane.com)

phone: (716) 853-2050

fax: (716) 853-2057

**\*\*NOTE\*\***

If you would like to be removed from this list, please e-mail:

[NPeters@Sliwa-Lane.com](mailto:NPeters@Sliwa-Lane.com)

submitted the affirmation of one doctor who failed to provide a numeric percentage of Plaintiff's loss of range of motion. Moreover, that doctor failed to qualitatively compare Plaintiff's injured state to any normal margin of reference. The Plaintiff also submitted the affirmation of a second doctor who did provide the requisite percentage of loss of range of motion, but based his findings on an examination that occurred more than three years after the car accident. Additionally, both experts' diagnoses of some of Plaintiff's injuries were based upon Plaintiff's subjective description of his condition, and so were too unreliable to counteract defendant's motion.

*Kneepel v Casem* (50 AD3d 1508 [4th Dept 2008])

**No-Fault, Serious Injury – Plaintiff Raised a Triable Question of Fact:** Defendants were granted summary judgment by the Supreme Court on the ground that no serious injury had been established by the Plaintiff in relation to the subject car accident. The Fourth Department reinstated the Plaintiff's complaint, reasoning that the affidavit submitted by Plaintiff in response to Defendant's motion was sufficient to raise an issue of fact. Plaintiff's affidavit in opposition contained a report from a chiropractor who had treated the injured Plaintiff for five years prior to the accident. The chiropractor stated that Plaintiff's injuries, while preexisting, were seriously exacerbated by the accident and that the extension of his spine had decreased significantly. A second doctor's report agreed that Plaintiff suffered a permanent consequential limitation of use of his lower back and that the injury was causally related to the car accident. Because Plaintiff met his burden of establishing injury and a causal link between the injury and the accident, the Fourth Department allowed the complaint to continue.

*Alcombrack v Swarts* (49 AD3d 1170 [4th Dept 2008])

**No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact:** Plaintiffs' were granted partial summary judgment on the issue of liability, including the issue of serious injury. Defendant conceded his negligence in causing the collision inasmuch as he drove through a stop sign, but he cross-moved for summary judgment dismissing the complaint on the ground that decedent had not sustained a serious injury. Supreme Court granted Plaintiffs' motion and denied Defendant's, determined in relevant part that Plaintiffs established their entitlement to judgment as a matter of law with respect to the 90/180 category of serious injury. The Fourth Department reversed both orders and dismissed the complaint, reasoning that Plaintiffs' evidence of ongoing headaches failed to establish that he sustained "a medically determined injury or impairment of a non-permanent nature." This determination requires the quantifiable, objective observation of a physician, and Plaintiffs' affidavit only contained medical conclusions based on Plaintiffs' subjective complaints of headaches.

## Category of Links

Find more information visit our Web page at [www.sliwa-lane.com](http://www.sliwa-lane.com)

## Contact Us

<http://www.sliwa-lane.com>

e-mail: [KLane@Sliwa-Lane.com](mailto:KLane@Sliwa-Lane.com)

phone: (716) 853-2050

fax: (716) 853-2057

**\*\*NOTE\*\***

If you would like to be removed from this list, please e-mail:

[NPeters@Sliwa-Lane.com](mailto:NPeters@Sliwa-Lane.com)

*Parmer v Opportunities Unlimited of New York* (48 AD3d 1252 [4th Dept 2008])

**No-Fault, Serious Injury – Defendant Established Prima Facie Case for Permanent Loss of Use – Plaintiff Raised a Triable Question of Fact for Permanent Consequential Limitation of Use and 90/180 Categories:** Defendants moved for summary judgment on the ground that Plaintiff did not sustain a serious injury. Supreme Court granted that part of Defendants' motion with respect to the permanent loss of use category but denied that part of the motion with respect to the permanent consequential limitation of use and 90/180 categories. The Fourth Department affirmed both orders, stating Defendants met their initial burden with respect to the permanent consequential limitation of use category by submitting the report of a physiatrist who examined Plaintiff and concluded that her disability was only temporary, and the report of an orthopedist who also examined Plaintiff and concluded that she had achieved pre-accident status and that any residual disability was caused by a different, later car accident. The Court concluded, though, that Plaintiff successfully rebutted Defendants' motion with medical testimony stating that the first accident was the cause of her injuries, and not the second, unrelated accident. Plaintiff included sufficient objective evidence of Plaintiff's injuries, including X ray reports, an MRI report, and an expert's designation of numeric percentages of Plaintiff's loss of range of motion, to defeat Defendants' motion. Further, this response included appropriate medical conclusion that these injuries resulted in disablement keeping her from working 90 out of the 180 days immediately following the accident.

*Ashquabe v McConnell* (14 Misc 3d 211 [Sup Ct, Erie County 2006])

**No-Fault, Serious Injury – Preexisting Degenerative Spinal Condition – Defendant's Motion for Summary Judgment Failed to Shift Burden of Proof to Plaintiff:** Defendant's medical expert's opinion that Plaintiff's bulging discs were degenerative in nature did NOT shift burden of proof to Plaintiff. Supreme Court denied Defendant's Motion for Summary Judgment, holding that Defendant's contention that Plaintiff's injuries were preexisting was insufficient to remove all issues of fact.

*Ashquabe v McConnell* (46 AD3d 1419 [4th Dept 2007])

**No-Fault, Serious Injury – Preexisting Degenerative Spinal Condition – Defendant Failed to Establish Prima Facie Case:** Appellate Division affirmed the order, holding that the medical affidavit in support of Defendant's motion failed to establish the existence or effect of any preexisting injury. The report failed in that it did not contain evidence that Plaintiff's pain might not be chronic and unrelated to the accident. Because Defendant's medical conclusion

## Category of Links

Find more information visit our Web page at [www.sliwa-lane.com](http://www.sliwa-lane.com)

## Contact Us

<http://www.sliwa-lane.com>

e-mail: [KLane@Sliwa-Lane.com](mailto:KLane@Sliwa-Lane.com)

phone: (716) 853-2050

fax: (716) 853-2057

**\*\*NOTE\*\***

If you would like to be removed from this list, please e-mail:

[NPeters@Sliwa-Lane.com](mailto:NPeters@Sliwa-Lane.com)

was insufficient, the Court held that Defendant failed to meet her burden and the order should be affirmed.

*Barnes v Estes* (46 AD3d 1441 [4th Dept 2007])

**No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact:** The Fourth Department held that Plaintiffs failed to raise triable issue of fact as to whether victim sustained permanent consequential limitation of use of a body organ following accident, permitting summary judgment. Defendants first met their burden by submitting the affirmation of Defendants' examining physician, which stated that the CT scan and MRI studies did not indicate that Plaintiff suffered any acute injury as a result of the accident, and the bulging discs at L3-4, L4-5 and L5-S1 were due to "congenital abnormalities." The affirmation of Plaintiff's treating physician did not provide a numeric percentage representing Plaintiff's loss of range of motion, nor did it provide a qualitative comparison of Plaintiff's limitations to the normal function of Plaintiff's spine. The Plaintiff, therefore, failed to raise an issue of fact in response to Defendant's Motion for Summary Judgment, the granting of which was affirmed.

*Anania v Verdgeline* (45 AD3d 1473 [4th Dept 2007])

**No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact:** Defendant made a Motion for Summary Judgment and met his initial burden by submitting numerous records and reports of Plaintiff's treating physicians indicating that Plaintiff's alleged injuries were related to injuries suffered in two workplace accidents, one that occurred before and one that occurred after the accident at issue. Plaintiff's orthopedic surgeon stated that Plaintiff's right carpal tunnel syndrome and resulting surgery were causally related to the accident, but the surgeon's opinion was not supported by the requisite "competent medical evidence based upon objective medical findings and diagnostic tests." Plaintiff, therefore, failed to meet the burden that had shifted to Plaintiff after Defendant submitted evidence that the injuries in question related to a preexisting condition and an intervening medical problem.

*Harris v Carella* (42 AD3d 915 [4th Dept 2007])

**No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Still Had Some Use of His Spine and Failed to Raise a Triable Question of Fact Regarding Fracture and Significant Disfigurement Categories:** Plaintiff brought a personal injury action based upon six categories of serious injury as defined within §5102. Defendant was denied summary judgment, and she appealed the order on five of these, neglecting to treat the 90/180 complaint in her brief on appeal. The Court agreed that Defendant met her burden with respect to the permanent consequential limitation of

## Category of Links

Find more information visit our Web page at [www.sliwa-lane.com](http://www.sliwa-lane.com)

## Contact Us

<http://www.sliwa-lane.com>

e-mail: [KLane@Sliwa-Lane.com](mailto:KLane@Sliwa-Lane.com)

phone: (716) 853-2050

fax: (716) 853-2057

**\*\*NOTE\*\***

If you would like to be removed from this list, please e-mail:

[NPeters@Sliwa-Lane.com](mailto:NPeters@Sliwa-Lane.com)

use and significant limitation of use categories, despite the fact that Defendant's physician was not a specialist in the particular area in question, and he relied upon an unsworn reports prepared by Plaintiff's treating physicians in rendering his opinion. Regardless, the Court found that Plaintiff properly raised an issue of fact as to these two categories by submitting properly prepared physician affidavits in opposition. The Court agreed, however, that Plaintiff did not properly establish permanent loss in that he still had some use of his spine, and that Plaintiff failed to provide evidence of a fracture or significant disfigurement.

*Carrier v Shaw* (41 AD3d 1245 [4th Dept 2007])

**No-Fault, Serious Injury – Plaintiff Raised a Triable Question of Fact – Medical Affidavit Based on Objective Measurement:** The Supreme Court granted Defendant's Motion for Summary Judgment on the issue that no serious injury was established in connection to the accident at issue. Plaintiff driver appealed regarding the permanent consequential limitation of use and significant limitation of use categories, but ignored the 90/180 contention made in her original complaint. The Appellate Division held that summary judgment affidavits of Plaintiff driver's physicians, which included findings based on their examination of Plaintiff as well as her x-rays and abnormal ENG findings, raised genuine issue of material fact as to whether Plaintiff suffered a serious injury within meaning of no-fault law. These affidavits were based, therefore, not only on the subjective complaints of the Plaintiff, as Defendant contended, but on objective measurement. The Court, therefore, held that Plaintiff sufficiently met her burden and raised a triable issue of fact, precluding a Motion for Summary Judgment.

*Downs v Kehoe* (39 AD3d 1152 [4th Dept 2007])

**No-Fault, Serious Injury – Defendant Established Partial Prima Facie Case – Plaintiff Raised a Triable Question of Fact Regarding the 90/180 Category:** Supreme Court properly granted Defendant's motion with respect to the significant limitation of use category of serious injury. Defendant met his initial burden with respect to that category, and the affidavits in opposition of Plaintiff and her treating physician, both of which were based on Plaintiff's subjective complaints of pain, failed to raise an issue of fact with respect to that category. The Fourth Department agreed to that end, but stated that the Defendant failed to meet his initial burden with respect to the 90/180 category of serious injury and thus that the court erred in granting Defendant's motion with respect to that category. In fact, Defendant's submission worked against him in that it raised an issue of fact with regards to the 90/180 category. He submitted evidence establishing that two of Plaintiff's treating physicians determined that Plaintiff was "temporarily totally disabled" within the first 180 days after the accident, and thus Defendant's submissions raised a triable issue of fact whether Plaintiff was prevented from performing her

## Category of Links

Find more information visit our Web page at [www.sliwa-lane.com](http://www.sliwa-lane.com)

## Contact Us

<http://www.sliwa-lane.com>

e-mail: [KLane@Sliwa-Lane.com](mailto:KLane@Sliwa-Lane.com)

phone: (716) 853-2050

fax: (716) 853-2057

**\*\*NOTE\*\***

If you would like to be removed from this list, please e-mail:

[NPeters@Sliwa-Lane.com](mailto:NPeters@Sliwa-Lane.com)

usual and customary activities during the requisite time period.

*Yoonessi v Givens* (39 AD3d 1164 [4th Dept 2007])

**No-Fault, Serious Injury – Defendant Established Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact:** Defendant appeals from an order denying her Motion for Summary Judgment seeking dismissal of Plaintiff’s complaint on the ground that Plaintiff did not sustain permanent consequential limitation of use and significant limitation of use categories of serious injury or sufficiently establish the 90/180 category. Although Defendant met her burden by submitting competent medical evidence establishing that Plaintiff did not sustain a serious injury under those categories Plaintiffs raised triable issues of fact by presenting the requisite competent medical evidence based upon objective medical findings and diagnostic tests. Moreover, although Defendant established that Plaintiff’s condition was preexisting and was not exacerbated by the accident, there was a triable issue of fact with respect to causation in that Plaintiff’s physician’s response was sufficient to causally relate the injuries to the car accident. The Court disagreed with the original ruling with regards to the 90/180 category, however, in that Defendant was able to prove that Plaintiff was not limited or impaired in carrying out substantially all of his customary daily activities, but rather was able to continue functioning in a full and unrestricted manner following the accident. Because Plaintiff failed to respond with a triable issue of fact, the Court granted that part of Defendant’s motion.

*McCarthy v Bellamy* (39 AD3d 1166 [4th Dept 2007])

**No-Fault, Serious Injury – Defendant Established Prima Facie Case – Plaintiff Failed to Meet Shifted Burden – Gap in Treatment and a Speculative Medical Opinion Did Not Address Preexisting Condition:** The Fourth Department held that Defendant’s Motion for Summary Judgment should have been granted in full on the ground that Plaintiff did not sustain a serious injury, though the Supreme Court granted the motion only in part. Notably, Defendant established the existence of a preexisting condition that Plaintiffs failed to address in opposition to the motion. The Court held that Plaintiff’s expert’s opinion, therefore, was speculative and failed to raise a triable issue of fact. Moreover, Plaintiffs’ failure to explain a 15- month gap in Plaintiff’s treatment allowed the Court to grant Defendant’s Motion for Summary Judgment, dismissing the complaint.

*Faso v Fallato* (39 AD3d 1234 [4th Dept 2007])

**No-Fault, Serious Injury – Defendant Established Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact:** Plaintiff brought suit in connection with two car accidents, the second of which was with the Defendant. Defendant made a Motion for Summary Judgment on the ground that all four of the proposed categories of serious injury were not causally related to his specific car accident.

## Category of Links

Find more information visit our Web page at [www.sliwa-lane.com](http://www.sliwa-lane.com)

## Contact Us

<http://www.sliwa-lane.com>

e-mail: [KLane@Sliwa-Lane.com](mailto:KLane@Sliwa-Lane.com)

phone: (716) 853-2050

fax: (716) 853-2057

**\*\*NOTE\*\***

If you would like to be removed from this list, please e-mail:

[NPeters@Sliwa-Lane.com](mailto:NPeters@Sliwa-Lane.com)

The Fourth Department agreed with Defendant, holding that Plaintiff's complaints after the first accident stayed the same after the second accident and the affirmation of an orthopedic surgeon who found no injury as the result of the second accident and no aggravation of any preexisting injury as the result of that accident. Defendant thus established that Plaintiff did not sustain a serious injury that was causally related to the second accident, and because Plaintiff failed to submit competent medical evidence to the contrary, he failed to raise a triable issue of fact.

*Jaromin v Northrup* (39 AD3d 1264 [4th Dept 2007])

**No-Fault, Serious Injury – Plaintiff Failed to Establish a Causal Relation – Medical Affidavit Contained Insufficient Description of Injury After the Accident and Was Based Only on Plaintiff's Subjective Description:** The Fourth Department held that the Supreme Court properly granted Defendant's Motion for Summary Judgment dismissing the complaint on the ground that Plaintiff did not sustain a serious injury with regards to the permanent loss of use, permanent consequential limitation of use and significant limitation of use categories. Defendant met her initial burden by establishing that Plaintiff did not sustain a qualifying serious injury that was causally related to the accident, and Plaintiff failed to raise any issues of fact with respect to those categories. Plaintiff did submit expert medical evidence, but the report failed to explain a 3.5 year gap in treatment, and failed to provide either a numeric percentage of Plaintiff's loss of range of motion or a qualitative assessment of Plaintiff's condition. Further, the Court held that the report was based only upon Plaintiff's subjective complaints of pain and thus is insufficient to overcome Defendant's entitlement to summary judgment.

– **By Michael T. Coutu** ([MCoutu@Sliwa-Lane.com](mailto:MCoutu@Sliwa-Lane.com))

LAW OFFICES OF SLIWA & LANE

840 MAIN-SENECA BUILDING . 237 MAIN STREET, BUFFALO, NEW YORK 14203  
© Copyright 2007 Sliwa & Lane . Phone: (716) 853-2050 . Fax: (716) 853-2057.