

**Scarano v Wehrens**

2006 NY Slip Op 30494(U)

August 23, 2006

Supreme Court, Suffolk County

Docket Number: 04-9799

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 3/2/06 (#002)  
7/6/06 (#003)  
ADJ. DATE 7/6/06  
Mot. Seq. # 002 - MG; CASEDISP  
# 003 - MD

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SHEILA SCARANO and EUGENE SCARANO,	:	MANHEIMER & CHARNAS LLP	
	:	Attorneys for Plaintiffs	
Plaintiffs,	:	747 Third Avenue, 37 <sup>th</sup> Floor	
	:	New York, New York 10017	
- against -	:		
	:	DeSENA & SWEENEY, LLP	
SUZANNE WEHRENS and GARY WEHRENS,	:	Attorneys for Defendants	
	:	1383 Veterans Memorial Hwy., Suite 32	
Defendants.	:	Hauppauge, New York 11788	
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Upon the following papers numbered 1 to 43 read on these motions for summary judgment and to strike the note of issue; Notice of Motion/ Order to Show Cause and supporting papers 1-19; 34-37; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 20-30; 38-40; Replying Affidavits and supporting papers 31-33; 41-43; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion (#002) by defendants for summary judgment dismissing the complaint on the ground that the plaintiffs each did not sustain a “serious injury” as defined in Insurance Law § 5102 (d), is granted and the complaint is dismissed; and it is further

**ORDERED** that this motion (#003) by defendants for an order vacating the note of issue and striking this matter from the trial calendar, or, in the alternative, directing further discovery, is denied as academic.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs Sheila Scarano (“Mrs. Scarano”) and Eugene Scarano (“Mr. Scarano”) as a result of a motor vehicle accident which occurred on Route 109 approximately 500 feet East of Straight Path, in the Town of Babylon, County of Suffolk, New York on March 5, 2004. At the time of the incident, Mrs. Scarano was a front seat passenger in the vehicle operated by Mr. Scarano. The accident allegedly occurred when the vehicle owned by defendant Gary Wehrens (“Mr. Wehrens”) and operated by defendant Suzanne

Wehrens (“Mrs. Wehrens”) came in contact with the motor vehicle operated by Mr. Scarano. The first cause of action in the complaint alleges that Mrs. Scarano sustained a serious injury resulting in basic economic loss and non-economic loss as defined by Section 5102 of the Insurance Law. The second cause of action in the complaint alleges that Mr. Scarano sustained a serious injury resulting in basic economic loss and non-economic loss as defined by Section 5102 of the Insurance Law. Defendants now move for summary judgment dismissing the complaint on the ground that plaintiffs have not sustained a “serious injury” as defined in Insurance Law § 5102 (d). Plaintiffs oppose this motion, and defendants have filed a reply.

Insurance Law § 5102 (d) defines “serious injury” as “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 order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). Another category under which plaintiff may recover is “significant disfigurement” (Insurance Law § 5102 [d]). Significant disfigurement qualifies as a serious injury under Insurance Law § 5102 (d), and exists if “a reasonable person viewing [the] plaintiff’s body in its altered state [regards] the condition as unattractive, objectionable, or \*\*\* the subject of pity and scorn” (*Siegle v County of Fulton*, 174 AD2d 930, 931, 571 NYS2d 626, quoting *Caruso v Hall*, 101 AD2d 967, 968, 477 NYS2d 722, *aff’d* 64 NY2d 843, 487 NYS2d 322 [1985]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1<sup>st</sup> Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion and relative to Mrs. Scarano, defendants submit, *inter alia*, the pleadings; plaintiffs' bill and supplemental bill of particulars; the transcripts of the plaintiffs' deposition testimony taken on March 14, 2005; the unaffirmed report dated October 13, 2000 of Mrs. Scarano's treating radiologist Stephen Greenberg, M.D.; the unaffirmed report dated November 12, 2002 of Mrs. Scarano's other treating radiologist Senghao Fong, M.D.; the affirmed report dated May 2, 2005 of defendants' examining orthopedist Arthur M. Bernhang, M.D.; and the unsigned report dated May 20, 2005 of defendants' examining neurologist Richard A. Pearl. Initially, the Court notes that the unsigned report of Dr. Pearl, which is not in admissible form, has not been considered (*see, Pagan v Gondola Cab Corp.*, 235 AD2d 251, 652 NYS2d 277 [1<sup>st</sup> Dept 1997]). Relative to Mr. Scarano, defendants submit the operative report dated March 31, 2004 of Dov Berkowitz, M.D.; the affirmed report dated April 20, 2005 of defendants' examining neurologist Richard A. Pearl, M.D.; and the affirmed report dated May 2, 2005 of defendants' examining orthopedist Arthur M. Bernhang, M.D.

In plaintiffs' bill and supplemental bill of particulars, Mrs. Scarano claims cervical disc herniations; cervical spinal surgery; cervical spondylosis; lumbar disc herniations; lumbar disc bulges; and an aggravation of her pre-existing conditions. She also claims that she has been confined to her home and bed intermittently since the date of the incident. Mr. Scarano claims arthroscopy and surgery of the left knee; pre- and post-surgical tears of the left knee; cervical disc herniations; cervical disc bulges; narrowing of the cervical spine; posterior disc herniations of the lumbar spine; and an aggravation of his pre-existing conditions. He also claims that he has been confined to his home and bed intermittently since the date of the incident. In addition, plaintiffs each claim a serious injury in the category of a disfigurement, a permanent loss of use, a permanent consequential limitation, a significant limitation, and a non-permanent injury.

Mrs. Scarano testified that her husband was driving at the time of the accident. After speaking with police who had arrived, she and her husband both refused an ambulance. Her husband then drove to a family wedding which they attended that day. Early the next morning, she went to a hospital emergency room, was examined and released. Sometime thereafter, she went to see Dr. Skura, a chiropractor, whom she had last seen four days before the accident for consultation with respect to her cervical spine. She had also consulted with Dr. Brietstein for pain management prior to the accident and Dr. Farmer, a surgeon at The Hospital For Special Surgery, sometime in 2000 for possible cervical spine surgery. Additionally, Mrs. Scarano consulted with Dr. Pierce, a chiropractor, as early as 1991 or 1992 for back and neck pain and had been treating with him for several years. She had been diagnosed with multiple sclerosis about twenty years prior to the incident. She had also been receiving social security disability for about three years. Lastly, Mrs. Scarano testified that she had been injured in about four prior accidents in 1991, 1997, 1999 and 2000.

Dr. Greenberg states that he performed MRI studies of Mrs. Scarano's cervical spine on October 13, 2000, and his findings include bilateral foraminal compromise at C5-6 and C6-7, compression of the right ventral aspect of the cord, and mild osteophyte formation. Dr. Greenberg also observed disc space narrowing at C5-6, which he opined was consistent with degenerative changes.

Dr. Fong states that he performed MRI studies of Mrs. Scarano's cervical spine on November 11, 2002, and his findings include central disc herniations at C6-7 with no significant pressure on the

cervical spinal cord. Dr. Fong also noted that while there was a narrowing of the disc spaces and signal intensities at C5-6 and C6-7, the lordotic curve of the cervical spine was well maintained.

Dr. Bernhang states that he performed an independent orthopedic examination of Mrs. Scarano on April 22, 2005, and his findings include symmetrical knee and ankle jerks; negative meniscal signs; no palpable fibromyalgia, trigger points or spasm around the neck; and a nontender, nonadherent scar over the anterior aspect of the neck. He also observed that cervical flexion, extension, lateral flexion, and rotation were 25, 35, 25/30 and 45/60 compared with the average ranges of 38, 38, 43/43 and 45/45. He further noted that Mrs. Scarano's dorsal lumbar expansion was 6½ (with normal being 4" and above) and that her sitting leg raise was normal. In addition, he noted that Mrs. Scarano was receiving social security disability payments at the time of the accident. Dr. Bernhang opined that Mrs. Scarano had sustained causally related traumatic aggravation of pre-existing spondylolitic changes of the cervical and lumbar spine and that there was no evidence of any residual of her injuries. He further opined that Mrs. Scarano's causally-related cervical surgery added a mild additional impairment to her neck, but that she had reached pre-injury status. In addition, Dr. Bernhang opined that there was no causally-related impairment of Mrs. Scarano's back or knees.

Mr. Scarano testified that he was involved in a motor vehicle accident with the defendants on March 5, 2004. After the police left the scene, he drove 45 minutes to the wedding with his wife, who was with him at the time. He initially went home but then went to a hospital emergency room. He subsequently treated with Dr. Delman, who examined him and referred him for various MRI exams. He also treated with Dr. Lodici. He received physical therapy treatment at Dr. Delman's office, initially going five times per week. After a few weeks, it decreased to three times per week. He had not worked for about ten years before the accident and was receiving social security disability in connection with a disabling back condition. Specifically, he was unable to stand at work. Additionally, he had been involved in about four prior accidents in 1991, 1993, 1999 and 2000. Mr. Scarano further testified that he had seen Dr. Tabershaw sometime in 2000 with respect to left knee pain and had received injections to his knee.

Dr. Berkowitz, in his operative report of Mr. Scarano's left knee states, *inter alia*, that he performed, among other things, arthroscopy, synovectomy, and meniscectomy of the Mr. Scarano's left knee and knee joint on March 31, 2004. He noted that the patellofemoral articulation showed chondral erosion and that the medial compartment showed some chondral wear. Dr. Berkowitz also observed, however, that there was a large tear involving the lateral meniscus.

Dr. Pearl states that he performed a neurological examination of the plaintiff on April 19, 2005, and his findings include intact sensation; a motor examination that was "5/5" in all extremities with normal tone; DTR's that were "2+" and symmetrical; no atrophy or fasciculations; and a negative straight leg raise test. He also noted that Mr. Scarano's lumbar flexion, extension, and lateral bending were 30, 10 and 15 degrees, with the normal ranges being 80, 25 and 30 degrees. He further noted that Mrs. Scarano's cervical flexion, extension, and rotation were full. In addition, Dr. Pearl noted that Mr. Scarano had a history of a severe degenerative condition of his spine and was disabled for several years due to a low back condition. Dr. Pearl opined that Mr. Scarano had sustained a cervical and lumbosacral sprain, but that there were no objective findings to indicate a neurological injury.

Dr. Bernhang states that he performed an independent orthopedic examination of Mr. Scarano on April 22, 2005, and his findings include no palpable fibromyalgia, trigger points or spasm about the neck; dorsal lumbar expansion to 7" (normal being 4" and above); and arthroscopic portal scars of the left knee which were imperceptible. He also observed that Mr. Scarano's knee extension and flexion were 0/0 and 125/115 degrees, with the average ranges being 0/0 and 134/134 degrees, and no ligamentous instability. In addition, Dr. Bernhang noted that cervical flexion, extension, lateral flexion, and cervical rotation were 40, 40, 30/40 and 60/60 degrees, with the average ranges being 38, 38, 43/43 and 48/48 degrees.

Defendants made a prima facie showing that plaintiffs each did not sustain a serious injury in the categories of a significant disfigurement, a permanent loss of use, a permanent consequential limitation, a significant limitation, and a non-permanent injury by their submission of plaintiffs' bill of particulars, plaintiffs' deposition transcripts, the reports of plaintiffs' treating physicians, and the reports of defendants' examining neurologist and orthopedist (*see, Oberly v Bangs Ambulance Inc., supra; Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]; *Temple v Doherty*, 301 AD2d 979, 755 NYS2d 448 [3d Dept 2003]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Edwards v DeHaven*, 155 AD2d 757, 547 NYS2d 462 [3d Dept 1989]). As defendants have met their burden as to all categories of serious injury alleged by each plaintiff, the Court turns to plaintiffs' proffer (*see, Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion and relative to Mrs. Scarano, plaintiffs submit, among other things, the affidavit dated April 20, 2006 of Mrs. Scarano; the affirmation dated April 28, 2006 of Mrs. Scarano's orthopedist Alexandre B. de Moura, M.D.; the affirmation dated April 18, 2006 of Mrs. Scarano's other orthopedist, Edward Rachlin, M.D.; the affidavit of Mrs. Scarano's chiropractor, James C. Pierce; and the affidavit dated April 20, 2006 of Mrs. Scarano's other chiropractor, Jamie Skurka. Initially, the Court notes that the affidavit of James C. Pierce, D.C., which is dated approximately one and one-half years after his last chiropractic treatment of Mrs. Scarano on November 4, 2002, and nearly one and one-half years prior to the subject accident, is without probative value and has not been considered (*see, Chinnici v Brown*, 295 AD2d 465, 744 NYS2d 186 [2d Dept 2002]). The Court also notes that the opinions by Drs. Rachlin and Skurka as to Mrs. Scarano's lumbar spinal surgery performed by Dr. O'Leary have been disregarded as without probative value, and in any event, these injuries were not included in plaintiffs' bill of particulars. In addition, the Court notes that Dr. Skurka is not qualified to render a surgical or orthopedic medical opinion as these matters are beyond the scope of chiropractic practice (*see, Education Law § 6551; McGuirk v Vedder*, 271 NYS2d 731, 706 NYS2d 485 [3d Dept 2000]; *Crozier v Lesniewski*, 195 AD2d 657, 599 NYS2d 729 [3d Dept 1993]). Moreover, the reports of Drs. de Moura, Rachlin, and Skurka are deficient to the extent that they have failed to submit copies of the diagnostic reports of Mrs. Scarano's body parts upon which they were relying (*see, Shay v Jerkins*, 263 AD2d 475, 692 NYS2d 730 [2d Dept 1999]; *Merisca v Alford*, 243 AD2d 613, 663 NYS2d 853 [2d Dept 1997]). To the extent, however, that they relied upon their own examination of Mrs. Scarano, the other affirmed reports submitted by plaintiffs, or reports submitted by defendants in support of the motion, their opinion was considered.

Mrs. Scarano states in her affidavit that she went with her husband to the emergency room at Good Samaritan Hospital for treatment the day following the accident. She then consulted with her chiropractor, Dr. Skurka, whom she had just seen two days earlier. Mrs. Scarano states that she had

injured herself in several prior automobile accidents, but alleges that her present inability to dress herself or lift her arms is due to her injuries from the instant accident. In addition, she states that she is extremely limited in her activities and remains disabled. She further states that she had a spinal fusion on her neck in May 2004, which helped alleviate her pain for a period of time. Lastly, Mrs. Scarano alleges that she has been under constant medical care and treatment since the subject accident.

Dr. de Moura states that he performed an orthopedic examination of Mrs. Scarano on March 15, 2004, and his findings include a diminished range of cervical motion and spasms of the cervical musculature. Dr. de Moura also observed that there was tenderness to palpation of her posterior lumbar spine. Dr. de Moura opined that Mrs. Scarano sustained a severe aggravation of her cervical spine radiculopathy.

Dr. Rachlin states that he performed an orthopedic examination of the plaintiff on March 22, 2004, and his findings include a prior history of cervical pain. He examined Mrs. Scarano on June 6, 2005 and diagnosed lumbar radiculopathy at the levels of L2-3 and L3-4. Dr. Rachlin also states that Mrs. Scarano was last seen by him on March 20, 2006 and opines that she had radicular pain. He opines that Mrs. Scarano had sustained a severe traumatic aggravation of a pre-existing cervical spondylosis as well as severe aggravation of her pre-existing, but previously asymptomatic, lumbar disc disease. Dr. Rachlin also opines that the aggravation of Mrs. Scarano's lumbar symptoms are permanent.

Dr. Skurka states that he first treated Mrs. Scarano on March 4, 2004, the day before the accident, by referral from Dr. Brietstein. At the time of her visit, she complained of weakness in her arms, an increase in cervical pain, and numbness in the upper arms. On March 11, 2004, he performed a complete examination of Mrs. Scarano and his findings include achilles reflexes that were "1+" bilaterally and weak; reflexes that were weak; and seated straight leg raising tests that were positive bilaterally. He also observed that Mrs. Scarano's cervical spine flexion, extension, left/right lateral flexion and left/right rotation were 20, 10, 5/5, 10/5 degrees and that Mrs. Scarano's lumbar flexion, extension, and left/right rotation were 20, 10, 20/10 degrees. Dr. Skurka opines that Mrs. Scarano sustained a lumbosacral sprain/strain and a severe, traumatic aggravation of her cervical disc herniations and radiculopathy. Dr. Skurka states that Mrs. Scarano was totally disabled when he last saw her, and that she was unable to perform her usual daily activities including walking, shopping, cooking and cleaning.

Plaintiffs' submissions are insufficient to raise a triable issue of fact as to Mrs. Scarano as Dr. Rachlin failed to adequately address the pre-existing degenerative condition of her cervical and lumbar spine and did not provide any foundation or objective medical basis supporting the conclusions which he reached, namely, that the alleged conditions were causally related to or exacerbated by the accident (*see, Knoll v Seafood Express*, 5 NY3d 817, 803 NYS2d 25 [2005]; *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Gomez v Epstein*, 2006 NY Slip Op 4246 [2d Dept, May 30, 2006]; *Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [1<sup>st</sup> Dept 2006]). Even if Dr. Rachlin had established a causal connection, his affirmation does not substantiate a significant limitation or permanent consequential limitation of a body system as he had not treated Mrs. Scarano for about two years at the time he executed his affirmation (*see, Ketz v Harder*, 16 AD3d 930, 793 NYS2d 203 [3d Dept 2005]; *Dongelewic v Marcus*, *supra*; *Keena v Trappen*, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]). Also, the affidavit of Dr. Skurka and the affirmation of Dr. de Moura, which do not state that they are

based upon recent examinations of Mrs. Scarano, are without probative value to the extent they attempt to project a permanent consequential limitation or a significant limitation (*see, Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Cerisier v Thibiu*, \_\_AD3d\_\_, 815 NYS2d 140 [2d Dept 2006]; *Jiminez v Kambali*, 272 AD2d 581, 708 NYS2d 460 [2d Dept 2000]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS1d 190 [2d Dept 1999]). Furthermore, the conclusory findings of Drs. de Moura, Rachlin and Skurka are insufficient as they have not provided any information concerning the nature of their treatments rendered to Mrs. Scarano since her initial visits, as well as the frequency and duration of those treatments (*see, Williams v Ciaramella*, 250 AD2d 763, 673 NYS2d 186 [2d Dept 1998]). In any event, Mrs. Scarano has not submitted sufficient medical proof adequately addressing her four prior automobile accidents (*see, Grant v Fofana*, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Additionally, Mrs. Scarano has not raised a triable issue of fact as to the category of a significant disfigurement (*see, Sirmans v Mannah*, 300 AD2d 465, 752 NYS2d 359 [2d Dept 2002]; *Loiseau v Maxwell*, 256 AD2d 450, 682 NYS2d 74 [2d Dept 1998]; *Koppelman v Lepler*, 135 AD2d 507, 522 NYS2d 12 [2d Dept 1987]). Thus, the affirmations of Drs. de Moura and Rachlin and the affidavit of Dr. Skurka, which are clearly tailored to meet the statutory requirements, are insufficient to establish a "serious injury" for Mrs. Scarano under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [1997], *lv denied*, 91 NY2d 806, 669 NYS2d 1 [1998]; *Hernandez v DIVA Cab Corp.*, 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]; *Batista v Olivio*, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; *Ponce v Magliulo*, 10 AD3d 644, 781 NYS2d 703 [2d Dept 2004]).

In opposition to this motion and relative to Mr. Scarano, plaintiffs submit, among other things, the affidavit dated April 20, 2006 of Mr. Scarano; the affirmation dated April 25, 2006 of Mr. Scarano's orthopedist, Dov Berkowitz, M.D.; the affirmation dated April 28, 2006 of Mr. Scarano's physiatrist, Daniel Brietstein, M.D.; the affidavit dated April 20, 2006 of Mr. Scarano's chiropractor, Jamie Skurka, D.C.; and the affirmation dated April 20, 2006 of Mr. Scarano's osteopath, Joseph Gregorace, M.D. The reports of Drs. Berkowitz and Brietstein are deficient to the extent that they have failed to submit copies of the diagnostic reports of Mr. Scarano's body parts upon which they were relying (*see, Shay v Jerkins, supra; Merisca v Alford, supra*). To the extent, however, that they relied upon their own examination of Mr. Scarano, affirmed reports submitted by plaintiffs, or reports submitted by defendants in support of the motion, their opinion was considered.

Mr. Scarano states in his affidavit that he went to the emergency room at Good Samaritan Hospital for treatment the day after the accident. On March 11, 2004, he consulted with a physician at Bellmore Medical Center in connection with pains in his neck, back and left knee. On March 16, 2004 he consulted with Dr. Berkowitz with the same complaints and subsequently had knee surgery on March 31, 2004. He came under the care of Dr. Skurka on March 30, 2004 and continued treatment until December 1, 2004. He also alleges that he underwent a series of two epidural injections on October 7, 9, 2004, but only received temporary relief. Lastly, Mr. Scarano alleges that he is unable to perform any physical activities including golf, and that he is unable to drive for more than twenty minutes at a time.

Dr. Berkowitz states that he performed an orthopedic examination of Mr. Scarano on March 16, 2004 in connection with the subject accident and his findings include decreased range of motion of the knee with effusion of the joint. Dr. Berkowitz states that he observed clear evidence of a pre-existing degenerative disease of Mr. Scarano's knee joint during arthroscopic surgery on March 31, 2004. He again treated Mr. Scarano on May 4, and September 14, 2004. Dr. Berkowitz opines that the subject

accident caused a severe aggravation of Mr. Scarano's pre-existing condition to the point where surgery was required to stabilize his knee joint. In addition, Dr. Berkowitz opines that when he first saw Mr. Scarano, he was disabled from the activities of his daily living.

Dr. Brietstein states that he performed a physiatric examination of Mr. Scarano on May 25, 2004, and his findings include an antalgic gait; cervical spine tenderness at C7-8; and depressed deep tendon reflexes in the right biceps and right brachioradialis. He states that he treated Mrs. Scarano for a total of five months, seeing him on June 25, July 30, August 27, September 24, October 7 and October 28, 2004. On July 30, 2004 he considered Mr. Scarano totally disabled. He next saw Mr. Scarano on August 27, 2004, and he noted a restriction of motion of the cervical and lumbar spine. Additionally, on October 7 and October 28, 2004, he performed lumbar epidural injections on Mr. Scarano. Dr. Brietstein opines that Mr. Scarano sustained a causally related aggravation of his pre-existing degenerative disc disease of the cervical and lumbar spine. Dr. Brietstein further opines that Mr. Scarano's pain was chronic and permanent in nature and that he had reached maximal medical improvement at the time of his last visit.

Dr. Skurka states he performed an initial chiropractic examination of Mr. Scarano on March 30, 2004, and his findings include deficits of cervical and lumbar ranges of motion. He states that Mr. Scarano treated with him on a regular basis from April, 2004 through October 14, 2004, his last visit. He opines that Mr. Scarano sustained cervical and lumbar sprains and strains and an aggravation of his pre-existing but asymptomatic degenerative disc disease of the cervical spine and aggravation of his pre-existing herniated lumbar discs. He further opines that the subject accident rendered Mr. Scarano permanently and totally disabled and that he has been unable to perform the normal and customary activities of his daily living, which includes walking, driving, bending and lifting. In addition, Dr. Skurka opines that Mr. Scarano had reached maximum medical improvement at the time of his last visit and that he had sustained a permanent limitation of use, a loss of function and a restriction of the cervical and lumbar spine.

Dr. Gregorace states that he performed an osteopathic examination of Mr. Scarano on March 11, 2004, and his findings include an antalgic gait, and palpable muscle spasms of the cervical and lumbar spine. He also noted that Mr. Scarano's cervical flexion and extension were limited at 50 and 10 degrees, with 90 and 30 degrees being normal. He again treated Mr. Scarano on March 18, April 7, 19, 21, May 4, June 4, July 16, September 10, October 15, and December 15, 2004. On December 15, 2004, Dr. Gregorace observed that Mr. Scarano had palpable muscle spasms of the cervical and lumbar spine, cervical flexion was limited to 45 degrees, diminished reflexes, and a positive straight leg raising test on the left at 60 degrees. He also noted that Mr. Scarano had undergone therapy two times per week from March 12, 2004 through December 21, 2004 with little change. In this regard, Dr. Gregorace opines that Mr. Scarano had reached the level of maximum medical improvement, and that he suffers a significant limitation and loss of use of his neck. Dr. Gregorace further opines that the subject accident caused a severe and chronic exacerbation of his pre-existing cervical and lumbar injuries and that he is now totally disabled.

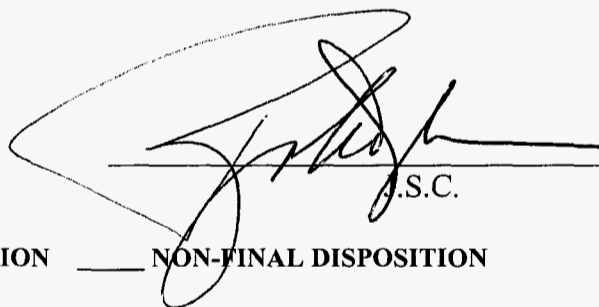
Plaintiffs' submissions are insufficient to raise a triable issue of fact as to Mr. Scarano, as his treating physicians and chiropractor failed to adequately address the pre-existing degenerative condition of his left knee and cervical and lumbar spine (*see, Franchini v Palmieri, supra; Mullings v Huntwork,*

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26 AD3d 214, 810 NYS2d 443 [1<sup>st</sup> Dept 2006]). In the absence of an explanation by Mr. Scarano's physicians as to the significance of his pre-existing conditions and degenerative findings, it would be sheer speculation to conclude that the subject accident was the cause of his injuries (*see, Lagois v Public Adm'r of Suffolk County*, 303 AD2d 644, 760 NYS2d 52 [2d Dept 2003]; *Freese v Maffetone*, 302 AD2d 490, 756 NYS2d 70 [2d Dept 2003]). In addition, the affidavit of Dr. Skurka and the affirmations of Drs. Berkowitz, Brietstein, and Gregorace, which do not state that they are based upon recent examinations of Mr. Scarano, are each without probative value to the extent they attempt to project a permanent consequential limitation or a significant limitation (*see, Brown v Tairi Hacking Corp.*, 23 AD3d 325, 804 NYS2d 756 [2d Dept 2005]; *Mohamed v Dhanasar*, 273 AD2d 451, 711 NYS2d 733 [2d Dept 2000]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Sainte-Aime v Suwai Ho*, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). Moreover, the conclusory findings of Dr. Skurka are insufficient as he has not provided any information concerning the nature of his treatments rendered to Mr. Scarano since his initial visits, as well as the frequency and duration of those treatments (*see, Silkowski v Alvarez*, 19 AD3d 476, 798 NYS2d 468 [2d Dept 2005]; *Williams v Ciaramella*, *supra*). In any event, Mr. Scarano has not submitted sufficient medical proof adequately addressing his four prior automobile accidents (*see, Grant v Fofana*, *supra*). Moreover, Mr. Scarano has not raised a triable issue of fact as to the category of a significant disfigurement (*see, Sirmans v Mannah*, *supra*; *Loiseau v Maxwell*, *supra*). Thus, plaintiffs have proffered insufficient medical proof to raise an issue of fact to establish a "serious injury" for Mr. Scarano under the no-fault law (*see, Tudisco v James*, 28 AD3d 536, 813 NYS2d 482 [2d Dept 2006]; *Paul v Trerotola*, 11 AD3d 441, 782 NYS2d 773 [2d Dept 2004]).

Since there is no evidence in the record demonstrating that plaintiffs' alleged economic loss exceeded the statutory amount of basic economic loss, their claims for economic loss in excess of basic economic loss must be dismissed (*see, CPLR 3212 [b]*; *see, Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, this (#002) motion by defendants for summary judgment in their favor is granted. In light of the above determination, the motion (#003) by defendants for, *inter alia*, an order vacating the note of issue and striking this matter from the trial calendar is denied as academic.

Dated:           AUG 23 2006          

  
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 J.S.C.

FINAL DISPOSITION       NON-FINAL DISPOSITION