

Cabrera v Gray

2014 NY Slip Op 32683(U)

September 29, 2014

Supreme Court, Bronx County

Docket Number: 306225/2012

Judge: Betty Owen Stinson

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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AMERICA CABRERA, RAFAEL CABRERA and
RAFELLA COLLADO,

Plaintiffs,

INDEX № 306225/2012

-against-

DECISION/ORDER

GREGORY PATRICK GRAY, GILDA R. CHIRAFISI
and CATALINA CABRERA,

Defendants.

-----X

HON. BETTY OWEN STINSON:

This motion by defendant Gregory Patrick Gray (“Gray”) for summary judgment as to liability in the happening of the accident and/or dismissal of the action for plaintiffs’ failure to demonstrate they suffered a serious injury as a result of the subject motor vehicle accident is granted for both reasons.

On April 9, 2012, a Toyota sedan owned and operated by defendant Catalina Cabrera, carrying all three plaintiffs as passengers, made a left turn at an intersection into the oncoming path of a Jeep owned and operated by defendant Gray. Gray’s Jeep hit the Toyota directly on its passenger side and, although the Jeep stopped at that point, the Toyota kept rolling and collided with a Lincoln stopped at a red light on the cross street. The airbags on the passenger side of the Toyota deployed. The Lincoln was owned and operated by defendant Gilda Chirafisi (“Chirafisi”).

The three passengers in the Toyota commenced this action against all three drivers of the vehicles involved, alleging neck, back and other injuries. A Note of Issue was filed on May 10,

2014 and this motion for summary judgment was made on June 6, 2014. Before this motion was made, the parties stipulated to dismissal of the action against Chirafisi.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing the motion must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

A party moving for summary judgment has the initial burden of establishing *prima facie* that it is entitled to judgment as a matter of law by submitting sufficient admissible evidence to demonstrate that there are no triable issues of fact (*Bush v St. Clare's Hospital*, 82 NY2d 738 [1993]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial (*Winegard v NYU Medical Center*, 64 NY2d 851 [1985]). If the moving party fails to meet its burden, the motion must be denied regardless of the sufficiency of the non-moving party's opposition (*id.*).

LIABILITY

According to Vehicle and Traffic Law ("VTL") § 1141,

[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway should yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection, or so close as to constitute an immediate hazard."

A driver lawfully proceeding straight through an intersection is entitled to anticipate that another driver intending to make a left turn into the intersection will obey traffic laws and yield the right-of-way (*Ahern v Lanaia*, 85 AD3d 696 [2nd Dept 2011])[plaintiff demonstrated *prima facie*

entitlement to summary judgment as a matter of law when defendant violated VTL § 1141 in making a left turn when it was not reasonably safe to do so, directly into the path of plaintiff's oncoming vehicle which was lawfully in the intersection]).

A defendant's bare allegation that plaintiff was speeding and could have avoided the accident was speculative, unsupported and did not raise an issue of fact where defendant did not see the plaintiff's vehicle before impact and could not estimate plaintiff's speed (*Ducie v Ippolito*, 95 AD3d 1067 [2nd Dept 2012]; see also *Loch v Garber*, 69 AD3d 814 [2nd Dept 2010] [defendant's conclusory and speculative assertions regarding speed and failure to try to avert accident not supported by competent evidence in the record]). "[A] driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (*Socci v Levy*, 90 AD3d 1020 [2nd Dept 2011]).

In support of his motion for summary judgment as to liability, Gray offered copies of the pleadings, the bill of particulars and the deposition testimony of the plaintiffs, of Catalina Cabrera and of Gray.

Plaintiff America Cabrera testified that she was born in March 1930 (deposition, September 4, 2013 at 9). At the time of the accident, she was a passenger in her daughter's car, seated in the back behind the driver (*id.* at 16). She never saw the Jeep that struck the car she was in (*id.* at 18). She became aware of the accident at the time of impact (*id.* at 19).

Plaintiff Rafael Cabrera ("Rafael") testified that he was seated in the front passenger seat of the Toyota at the time of the accident (deposition, September 4, 2013 at 14). As the Toyota approached the intersection, the light was yellow (*id.* at 16). His daughter, who was driving, made a left turn (*id.*). He did not see the Jeep before the impact (*id.* at 17).

Plaintiff Rafella Collado ("Collado") testified that she was seated behind the front passenger seat in the Toyota and it was almost finished crossing the intersection when the impact occurred (deposition, September 4, 2013 at 18-19). Collado did not see the Jeep until the impact occurred (*id.* at 17). The Toyota kept going after impact and hit another car "where her lights are" (*id.* at 29).

Defendant Catalina Cabrera testified that she was the driver of the Toyota struck by Gray's Jeep (deposition, April 14, 2014 at 6). She was traveling north on Broadway going about 25 miles per hour as she approached the traffic light at the subject intersection (*id.* at 14, 40). The traffic light was green (*id.* at 14). She moved into the left lane (*id.* at 41). She stopped the car completely for five minutes or "three minutes maybe" and turned her left turn signal on (*id.* at 15, 43-45). The only traffic she saw approaching from the oncoming direction was a bus about a block away from her (*id.* at 14). The bus was turning onto Broadway (*id.* at 16). The reason she stopped was to see if a car was coming and to allow the bus "a chance to come", but the bus did not (*id.* at 16, 45). Cars passed her on her right (*id.* at 45-46).

She saw no cars coming from the opposite direction and did not see the Jeep before it struck her car (*id.* at 15). Everything "happened so quickly" (*id.* at 29). The Jeep hit her car with a very heavy impact (*id.* at 18). Her car was still in gear and continued rolling forward until it ran into Chirafisi's Lincoln which was stopped at the red light of the cross-street (*id.* at 20, 51). After the second impact, Catalina Cabrera got out of the car (*id.* at 51). She admitted telling police who responded to the scene that she got out of the car after the first impact, but she was "panicked" at the time (*id.* at 60-61). She knew the Jeep was coming at a high rate of speed because it was approaching the intersection from a "downgrade", and if the driver's foot had been on the brake,

he would have had a chance to avoid running into her car (*id.* at 18, 21, 44).

Gray testified that he was traveling south on Broadway, going about 30 miles per hour, the speed limit at that location (deposition, April 14, 2014 at 14). He first saw the Toyota coming from the opposite direction about halfway up the block and going at about the same speed as he was (*id.* at 29, 30, 49). He did not see a turn signal on the Toyota (*id.* at 49). The traffic light was green as he approached the intersection of Broadway and 259th Street, traveling in the left lane (*id.* at 14, 40, 44). There were no cars in front of him within a hundred feet and there was nothing obstructing his view (*id.* at 25, 29).

He just got to the intersection, maybe a foot inside it, when the Toyota turned in front of him (*id.* at 15-17). The Toyota's driver did not stop or slow down first (*id.* at 30, 52). Gray had no time for evasive action (*id.* at 19). He did not even have time to apply his brakes; it happened too quickly (*id.* at 17, 19, 48). The impact took place in the middle of the intersection (*id.* at 44). The Jeep hit both doors of the Toyota's passenger side (*id.* at 19). The impact was heavy, but Gray's air bags did not deploy (*id.* at 46, 48). His car stopped, either from the impact or because he braked at some point without realizing it (*id.* at 17). The Toyota did not move sideways from the impact, but kept going forward, hitting another car waiting for the light on 259th Street (*id.* at 20). Gray drove away after speaking to the police (*id.* at 45-46). He was not given a ticket (*id.* at 32).

In opposition to the motion as it referred to liability, plaintiffs argued there was an issue of fact as to whether Gray exercised ordinary care at the time of the accident. Plaintiffs argued that Catalina Cabrera testified Gray was traveling at a high rate of speed, that traffic was "heavy", and her view was obstructed by a bus. They argued that Gray testified he was traveling at 30 miles per

hour, did not apply his brakes and did not slow down before hitting the Toyota. According to plaintiffs, that testimony demonstrated that Gray did not have a non-negligent explanation for the accident.

Contrary to plaintiffs' arguments, Gray has demonstrated his *prima facie* entitlement to summary judgment as to liability which plaintiffs have not refuted with admissible evidence. The parties' testimony establishes that Catalina Cabrera violated VTL § 1141 when she turned left into the path of oncoming traffic which was lawfully entering the intersection. There is no evidence to show any comparative fault on the part of Gray.

Both drivers testified the light was green at all relevant times. If so, Gray had right-of-way in the intersection and Catalina Cabrera failed to see him as she made a right turn. Even if the traffic light was yellow just as Catalina Cabrera approached the intersection, as asserted by Rafael Cabrera, Gray still had right-of-way to proceed directly through the intersection, although this would have put both drivers on notice of an imminent light change and the need to exercise additional caution. If the light was yellow as she approached the intersection, and she stopped completely as she also testified, she would have to have waited for the light to change to green before turning, in which case she would still have no excuse for failing to see the Jeep coming or for turning directly into its path. The issues of fact, whether she stopped at the light, whether the light was yellow or green, or whether her turn signal was on, are not material. She made a left turn when it was not safe to do so. Neither driver testified their view was obstructed.

The testimony of the drivers does not create any other issue of fact for trial. Catalina Cabrera's testimony that Gray was traveling at a "high rate of speed" is inadmissible since she also testified she never saw his car before impact. Catalina Cabrera had no way of knowing how

fast Gray was going before the impact, except by judging speed based on the force of impact, and there was no foundation for her ability to make such a calculation. In addition, she testified that she was “panicked” at the scene (testimony of Catalina Cabrera at 60-61).

She did *not* testify that traffic was “heavy”, rather that the *impact* was “heavy” (testimony at 18). She testified that the only vehicle she observed at the time she made her left turn was a bus a block away from her (testimony at 14) and she never testified that her view was obstructed. Her assertion that Gray should have had his foot on the brake because he was traveling down a hill and therefore could have avoided the accident, is based on nothing more than inadmissible speculation (*see Loch*, 69 AD3d 814 [speculative assertions regarding speed and failure to avert accident insufficient as defense to violation of § 1141]).

Gray testified that he did not apply his brakes because *he did not have time to do so* before the Toyota turned in front of him. Both drivers testified that the accident happened “quickly” (testimony of Catalina Cabrera at 29, testimony of Gray at 17, 19, 48). The action must be dismissed as to Gray, therefore, for lack of any evidence demonstrating his fault in the happening of the accident (*see Socci*, 90 AD3d 1020 [driver with right-of-way and only seconds to react to vehicle which did not yield is not comparatively negligent]).

SERIOUS INJURY

In order to recover for non-economic loss resulting from an automobile accident under New York’s “No-Fault” statute, Insurance Law § 5104, the plaintiff must establish, as a threshold matter, that the injury suffered was a “serious injury” within the meaning of the statute. “Serious injury” is defined by Insurance Law § 5102(d) to include, among other things not relevant here, a “permanent loss of use of a body organ, member, function or system”, a “permanent consequential

limitation of use of a body organ or member”, a “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 constitutes such person’s usual and customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.”

The initial burden on a threshold motion is upon the defendants to present evidence establishing that plaintiff has no cause of action, i.e.: that no serious injury has been sustained. It is only when that burden is met that the plaintiff would be required to establish *prima facie* that a serious injury has been sustained within the meaning of Insurance Law § 5102(d) (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Licari v Elliot*, 57 NY2d 230 [1982]).

To make out a *prima facie* case of serious injury, a plaintiff must produce competent medical evidence that the injuries are either “permanent” or involve a “significant” limitation of use (*Kordana v Pomelito*, 121 AD2d 783 [3rd Dept 1986]). A finding of “significant limitation” requires more than a mild, minor or slight limitation of use (*Broderick v Spaeth*, 241 AD2d 898, *lv denied*, 91 NY2d 805 [1998]; *Gaddy v Eyler*, 167 AD2d 67, *aff’d*, 79 NY2d 955 [1992]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not suffice to establish a serious injury (*Scheer v Koubek*, 70 NY2d 678 [1987]).

To satisfy the requirement that plaintiff suffered a medically determined injury preventing her from performing substantially all of her material activities during 90 out of the first 180 days, a plaintiff must show that “substantially all” of her usual activities were curtailed (*Gaddy*, 167 AD2d 67). The “substantially all” standard “requires a showing that plaintiff’s activities have been restricted to a great extent rather than some slight curtailment” (*Berk v Lopez*, 278 AD2d 156

[1st Dept 2000], *lv denied*, 96 NY2d 708).

Allegations of sprains and contusions do not fall into any of the categories of serious injury set forth in the statute (*Maenza v Letkajornsook*, 172 AD2d 500 [2nd Dept 1991]). “Absent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert’s ‘conclusion that plaintiff’s condition is causally related to the subject accident is mere speculation’, insufficient to support a finding that such a causal link exists” (*Diaz v Anasco*, 38 AD3d 295 [1st Dept 2007], citing *Montgomery v Pena*, 19 AD3d 288 [2005]). A claim of exacerbation of prior injuries or conditions is without support if plaintiff’s experts fail to provide any basis for determining the extent of limitation caused by that exacerbation beyond any pre-existing limitations (*Brand v Evangelista*, 103 AD3d 539 [1st Dept 2013]).

“Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury” (*Pommels v Perez*, 4 NY3d 566 [2005]). Nor is evidence of radiculopathy (*Casimir v Bailey*, 70 AD3d 994 [2nd Dept 2010]). A plaintiff’s subjective complaints of pain are insufficient, without more, to establish that herniated discs constitute a serious injury (*Pierre v Nanton*, 279 AD2d 621 [2nd Dept 2001]).

The defendant may rely on medical records and reports prepared by plaintiff’s treating physicians to establish that plaintiff did not suffer a serious injury causally related to the accident (*Franchini*, 1 NY3d 536). Once the burden has shifted however, an affidavit or affirmation by the person conducting a physical examination of the plaintiff is necessary to establish a serious injury, unless plaintiff is offering unsworn reports already relied upon by the defendant (*Grossman v*

Wright, 268 AD2d 79 [3rd Dept 2000]; *see also Zoldas v Louise Cab Co.*, 108 AD2d 378 [1st Dept 1985]). The affirmation must set forth the objective medical tests and quantitative results used to support the opinion of the expert (*Grossman*, 268 AD2d 79). “An expert’s *qualitative* assessment of a plaintiff’s condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system (cite omitted)” (*Toure v Avis Rent A Car Systems*, 98 NY2d 345 [2002]). A conclusory affidavit of the doctor does not constitute medical evidence (*Zoldas*, 108 AD2d 3778; *see also Lopez v Senatore*, 65 NY2d 1017 [1985] [conclusory assertions tailored to meet statutory requirements insufficient to demonstrate serious injury]).

In support of the motion as it refers to serious injury, Gray offered the bill of particulars, the deposition testimony of the plaintiffs and the affirmations of Dr. Joseph Y. Margulies.

AMERICA CABRERA

The bill of particulars alleged that America Cabrera sustained herniated spinal discs at C4-5, C6-7, and L5-S1; exacerbation of a pre-existing herniated disc at L4-5, compression damage to C5 and C6 nerve roots, foraminal stenosis (narrowing) near the herniated discs and post-concussion syndrome. America Cabrera testified that her body moved forward and back from the impact, she was not able to breathe and her neck and ribs were hurting (deposition, September 4, 2013 at 23-24). When paramedics came, she complained that she could not breathe and her left knee was swollen (*id.* at 27). She was given ice for her knee.

America Cabrera was taken by ambulance to St. Joseph’s Hospital in Yonkers (*id.* at 31). Once at the hospital, she complained of pain in her neck and the ribs on her right side (*id.* at 32-33). X-rays were taken, she was given medication for pain and a cane and discharged (*id.* at 32-

34). One week later, she sought further medical treatment and started physical therapy (*id.* at 36). She has a general physician, a Dr. Kohn, but she never consulted him about the accident (*id.* at 35-36).

America Cabrera complained about her lower back to the physical therapist (*id.* at 38-40). She received therapy to her neck and back and some sort of injections to those areas as well (*id.* at 38, 43). She stopped that therapy because the therapist said she was no longer able to give her more sessions (*id.* at 45-46). America Cabrera then started therapy at a new place (*id.* at 46). She was given prescriptions for medication, but she did not fill them because of the expense (*id.* at 58). She bought over-the-counter medication instead (*id.* at 58-59).

Before the accident, America Cabrera would cook, clean, wash dishes and clothes and go to the supermarket (*id.* at 48). She can no longer sweep, mop, clean the house or do heavy lifting (*id.* at 49). She still cooks, but her back hurts if she tries to mop (*id.*). Her neck and back were "good" before the accident (*id.* at 49-50). She filed a previous lawsuit once when she fell and broke her hand (*id.* at 55).

Dr. Margulies, an orthopedic surgeon, examined America Cabrera on October 31, 2013, finding the 83-year-old woman to be 5' 3" tall, weighing 138 pounds. Dr. Margulies was given her bill of particulars and her hospital records from the date of the accident for examination. She gave a history of heart valve surgery seven years prior and complained of difficulty walking, bending, standing, sitting and lifting due to pain in her neck and back, radiating to her left lower limb, along with nausea and dizziness. America Cabrera complained her condition had not improved. She made no complaints about her shoulders or knees to Dr. Margulies.

Dr. Margulies found no spasm or tenderness in her cervical spine and full range of motion

in her neck, measured numerically by goniometer and compared to normal values established by the American Medical Association. Cervical flexion was 45 degrees out of a normal 45, extension 45 degrees out of 45, lateral flexion 45 degrees out of 45 and rotation 80 degrees out of 80. Her foraminal compression tests were normal. She had negative apprehension and impingement signs in her shoulders.

Dr. Margulies concluded degenerative changes in her lower back accounted for the minimal limitation of range of motion found in her lumbar spine. Flexion was measured at 80 degrees out of a normal 90, extension 25 degrees out of 30, lateral bending was 25 out of 30, and rotation was completed at 25 degrees out of a normal 30. She had no muscle spasm or tenderness in her lumbar spine and Patrick's and Straight Leg Raising tests were negative. All the joints of her upper and lower extremities had full range of motion, no instability, erythema, swelling, increased warmth or tenderness. There was no atrophy or wasting of the muscles. Dr. Margulies found no objective orthopedic findings and no functional disability. His diagnosis was resolved cervical and lumbar sprains.

In opposition to Gray's motion regarding serious injury, America Cabrera offered only certified records from a second physical therapy facility she visited, Continental Medical, P.C., beginning fourteen months after the accident. America Cabrera's initial examination with DeLys E. St. Hill, M.D., of that facility took place on June 4, 2013. America Cabrera complained of pain in her cervical, thoracic and lumbar spine, radiating into both legs. She reported having received previous treatment, including physical therapy, injections, chiropractic treatment and acupuncture. She provided a previous medical history of high blood pressure, heart surgery and kidney stones.

Dr. St. Hill noted America Cabrera's deep tendon reflexes were normal throughout her

upper and lower extremities. Hoffman's sign and Babinski's were negative. All joints of the upper and lower extremities demonstrated normal range of motion and muscle testing was normal. America Cabrera's cervical spine revealed spasm and tenderness on palpation and a Compression test was positive. Range of motion was "decreased with pain in the neck", but no measurement of the extent of limitation was noted. Lordosis of both the cervical and lumbar spine was observed to be normal. Dr. St. Hill found tenderness and spasm in America Cabrera's lumbar spine and her lumbar range of motion was "decreased with low back pain". Muscle testing was "decreased", but she had "no difficulty arising to the neutral position".

Dr. St. Hill's impression was both pain syndrome and traumatic pain syndrome of the neck and back, radiculopathy, sprain and strain and "unspecified" myalgia/myositis. His treatment plan was an x-ray for her left shoulder and MRIs for the cervical and lumbar spine. He noted that, if her history was true, the "present signs and symptoms" were causally related to the referenced accident.

On July 10, 2013, Gordon Davis, Doctor of Osteopathy, examined America Cabrera. She complained of neck pain and mid and low back pain. This time she denied radiating pain, numbness or tingling, shooting pain or weakness. Dr. Davis noted prior chiropractic treatment at another facility and EMG studies performed there showing C6 radiculopathy, with normal results in the lumbar spine. MRI reports of the cervical and lumbar spine from yet a different facility reported bulging discs in the lumbar spine and herniated discs in the cervical spine, contacting the spinal cord.

Examination by Dr. Davis of the cervical spine showed flexion at 30 degrees out of a normal 45, extension at 15 degrees out of 30, lateral bending at 30 degrees out of 45 and rotation

at 50 degrees out of 75, with pain at the end points of motion in all planes. Dr. Davis did not say how the measurements were made or whether they were the result of active or passive movements. Dr. Davis found tenderness, but made no mention of muscle spasm. A Foraminal Compression test was positive. Motor strength in the upper extremities was full.

Examination of the lumbar spine found flexion at 70 degrees out of 90, extension at 20 degrees out of 30, lateral bending at 15 degrees out of 25 and rotation at 35 degrees out of 45, with pain at the end point of motion in all planes. A Straight Leg Raising test, however, was negative. Motor strength at the L4, L5 and S1 nerve roots was full at 5/5. The patient could perform heel and toe walking and a full squat, albeit with pain.

Dr. Davis concluded, within a reasonable degree of medical certainty, that the subject accident caused patient's "injuries", those injuries being whiplash injury of the cervical spine, "traumatic" disc herniations at C4-5 and C5-6 per the MRI, "traumatic" C6 radiculopathy per the EMG, and "traumatic" low back pain with disc bulges.

Dr. St. Hill examined America Cabrera again on August 13, 2013. He measured range of motion in her cervical spine and lumbar spine and found slight improvement over Dr. Davis' measurements in the cervical spine overall and much the same measurements in the lumbar spine with spasm in all areas. He found a positive Straight Leg Raising test in contrast to Dr. Davis' findings approximately one month earlier. All tests of her shoulders were negative. Dr. St. Hill's impression was traumatic cervical and lumbar spine pain syndrome with documented bulges and herniations and radiculitis. He recommended continued physical therapy.

Dr. St. Hill's final examination of America Cabrera took place on November 26, 2013. She continued to complain of neck and low back pain. Dr. St. Hill's measurements of range of

motion in her cervical and lumbar spine were mostly worse than found in the previous examinations, despite treatment, with only one area of improvement, cervical and lumbar rotation. He found only "mild" spasm in the cervical and lumbar spine and a negative Straight Leg Raising test once again. His impression was traumatic cervical and lumbar pain syndrome, with documented herniated nucleus pulposus in the cervical spine. Despite her slightly worsened range of motion measurements, Dr. St. Hill discharged America Cabrera from physical therapy.

The certified medical records included the unaffirmed MRI reports of America Cabrera's cervical and lumbar spine from another facility, Radiology of Westchester, P.C. The cervical spine MRI study, performed on May 17, 2012, revealed no evidence of fracture or dislocation. The study showed multilevel dehydration and desiccation of the discs. Herniated discs at C4-5 and C5-6 were in contact with the cord. There was a bulging disc at C6-7. Foramina were mildly stenotic at C4-5 and C6-7, but the canal was patent at all areas. In the lumbar MRI study, performed on June 26, 2012, disc bulges at L4-5 and L5-S1 were reported, with mild multilevel disc dehydration.

Defendant Gray has established his entitlement to summary judgment regarding the alleged serious injury sustained by America Cabrera as a result of the subject accident, which she has not refuted with admissible medical evidence. Gray met his burden with admissible medical evidence.

The examination by Dr. Margulies showed America Cabrera had no permanent or significant residual injuries due to the subject motor vehicle accident. She had full range of motion in her cervical spine, no problems in her shoulders, and only a minimal decrease in range of motion in her lumbar spine with a negative Straight Leg Raising test. She had no functional

disability due the accident. Her deposition testimony was sufficient to show that she was not prevented by a medically determined injury from carrying out *substantially all* her daily activities for 90 out of the first 180 days following the accident. She testified she continues cooking, although she no longer cleans. The bill of particulars claimed only two weeks of confinement to bed and home and no more has been claimed since it was served. Furthermore the bill of particulars claimed only two weeks of confinement to bed and home and no more has been claimed since it was served.

America Cabrera did not raise an issue of fact with her submissions in opposition. The MRI reports were not affirmed. The certification by Continental Medical, P.C., does not cover records from another facility. Even if the MRI reports were admissible, herniated and bulging discs, with nothing more, are insufficient to show injury as a result of a motor vehicle accident. Nor are sprains, strains or radiculopathy. America Cabrera's subjective complaints of pain and limitation are insufficient to defeat summary judgment. The injuries she complains of now are not the same as her reported complaints at the scene, nor her complaints at the hospital, with the sole exception of a complaint there about her neck. The impressions reached by Dr. Davis and Dr. St. Hill regarding that injury was "whiplash", sprains and strains, traumatic herniations, radiculopathy and pain syndrome. Injury to her back was not mentioned either at the scene of the accident nor at the hospital. There is no evidence of injury to her knee or ribs lasting more than possibly the two weeks she allegedly spent in bed following the accident.

No records of treatment before fourteen months following the accident have been produced, leaving a gap in proof of her treatment that is completely unexplained. America Cabrera attributed her current limitations in cleaning and mopping only to pain in her back, but

no evidence has been offered to explain the extent to which her alleged pre-existing back injury was exacerbated by the subject motor vehicle accident. The minimal limitation in range of motion found by Dr. Margulies in her lumbar spine cannot be attributed to the accident without that explanation.

Her treating doctors' conclusions of causation were made at a minimum of fourteen months after the subject accident and related only to their impressions at the time, which were of whiplash, disc bulges, herniations and radiculopathy on the part of Dr. Davis, and "traumatic" cervical and lumbar pain, sprain, strain and radiculopathy on the part of Dr. St. Hill. None of those conditions constitute a serious injury as a matter of law without corresponding functional disabilities. Characterizing the pain, sprain and strain as "traumatic" is gratuitous without an explanation of the basis for that finding.

Only Dr. Davis expressed his opinion within a reasonable degree of medical certainty. Neither opinion was affirmed although the records were certified. Both doctors were apparently in possession of the MRI reports and supposedly relied on those reports to form their opinions, yet both were silent regarding the obviously degenerative condition of multilevel dehydration found in the reports. With no explanation, both doctors appear to attribute the bulging and herniated discs to the subject motor vehicle accident, although there is not a word in either MRI report tending to address causation other than dehydration and desiccation.

RAFAEL CABRERA

In support of the motion inasmuch as it asked for relief based on a lack of serious injury in the case of Rafael Cabrera, Gray offered the bill of particulars, the deposition testimony of Rafael Cabrera and the affirmation of Dr. Margulies. The allegations regarding Rafael Cabrera's injuries

in the bill of particulars are that he suffered herniated discs at C3-4, C4-5, L4-5 and L5-S1, foraminal stenosis (narrowing) with compression damage at C5, C6, L5 and S1 nerve roots, exacerbation of a pre-existing herniated disc at L4-5, radiating lumbar pain and post concussion syndrome.

Rafael Cabrera testified that he was a front-seated passenger at the time of impact (deposition, September 4, 2013 at 14). He did not see the Jeep before it struck the car door next to him (*id.* at 16-17). His air bag did not deploy (*id.* at 19). His right leg made contact with the inside of the car (*id.* at 20). His right leg and hip were swollen (*id.* at 24). He was x-rayed at the hospital and told to “be careful” (*id.* at 24-25). Before the accident he had no activities or hobbies (*id.* at 29). He did nothing before because of his age besides going outside for fresh air and to watch guys playing baseball (*id.* at 30). Now he cannot do “anything” because of the problems with his “brain” (indicating his neck), his back and his leg (*id.*). He just stays at the house helping out with “everything”, including sweeping and washing dishes (*id.*). He has not gone back to Santo Domingo to see family since the accident because he does not “feel well” (*id.* at 32).

Dr. Margulies examined Rafael Cabrera on October 31, 2013 finding an 89-year-old man standing 5' 8" tall and weighing 140 pounds. Dr. Margulies was provided with the bill of particulars and hospital records from the day of the accident for examination. Rafael Cabrera reported that he had received previous physical therapy, chiropractic care, acupuncture, ultrasound and massage, but his condition was the “same”. He complained of pain in his neck and back, radiating to his buttock and right thigh as well as nervousness, and difficulty bending, standing, lifting and sleeping.

Dr. Margulies measured range of motion using a goniometer and American Medical

Association guidelines. Rafael Cabrera's cervical and lumbar spine range of motion demonstrated degenerative changes and a minimal limitation in range of motion. The cervical spine range of motion was measured with flexion at 40 degrees out of a normal 45, extension at 40 degrees out of 45, lateral bending at 40 degrees out of 45, and rotation at 70 degrees out of 80. Neurovascular status was intact and he had no deficits in his upper extremities. There was no spasm or tenderness.

The lumbar spine measured flexion at 80 degrees out of a normal 90, 25 degrees out of 30, lateral bending at 25 out of 30 and rotation at 25 out of 30. Straight Leg Raising and Patrick's tests were negative. Examination of the right lower limb revealed each of the joints brought through full range of motion without instability, erythema, swelling, increased warmth or tenderness. No atrophy or muscle wasting was observed. The hips showed some degenerative changes with minimal limitation in range of motion in flexion at 110 degrees out of a normal 120, and all other planes of motion with full range of motion.

Dr. Margulies' diagnosis was resolved cervical and lumbar sprains. He found no residual, objective orthopedic findings and no functional disability.

In opposition to the motion, plaintiffs offered the certified records from Continental Medical, P.C., which Rafael Cabrera visited beginning fourteen months after the accident. The records contained unaffirmed MRI reports of Rafael Cabrera's neck and back performed in an unrelated facility.

The initial consultation at Continental Medical, P.C., took place on June 4, 2013 with Dr. St. Hill. Rafael Cabrera complained of pain in his neck, low back, right hip and thigh and headaches. He reported that he experienced no head strike or loss of consciousness at the time of

the subject accident. Dr. St. Hill found spasm and “decreased” range of motion, with pain, in Rafael Cabrera’s cervical spine. A compression test was positive. There was no spasm or tenderness in the lumbar spine, but range of motion was “decreased” with low back pain. The patient had “no difficulty arising to the neutral position”. Straight Leg Raising test, Patrick’s and Lasegue’s tests were positive. Rafael Cabrera’s gait was normal and both upper and lower extremities demonstrated range of motion within normal limits and no tenderness. Muscle testing was normal.

Dr. St. Hill’s report of the visit included selected results of the MRI studies performed on May 17, 2012 and June 26, 2012, despite the fact the latter study was performed after this initial visit. Dr. St. Hill’s impression was cervical and lumbar pain syndrome, as well as “traumatic” pain syndrome, radiculopathy, sprain, strain, unspecified myalgia/myositis and sciatica (radiating low back pain). Dr. St. Hill concluded that, if the patient’s history was true, his “signs and symptoms” were causally related to the subject motor vehicle accident.

The MRI study of Rafael Cabrera’s cervical spine performed on May 17, 2012 showed bulging or herniated discs at C4-5 through C7-T1 and “[a]dvanced multilevel degenerative spondylosis”. There was a partial fusion of C3 and C4 which was “probably congenital”.

The MRI study of Rafael Cabrera’s lumbar spine performed on June 26, 2012 showed “[m]ultilevel disc dehydration and desiccation” and mild levoscoliosis. Hypertrophic facet disease contributed to bulging and/or herniated discs from L3-4 through L5-S1. There were also herniated and bulging discs, respectively, at L1-2 and L2-3. The report noted that the “normal lordotic curvature of the lumbar spine is well maintained”. The final impression of the physician performing the MRI stated nevertheless that “straightening of the lumbar lordosis” was

“compatible with muscle spasm”.

Dr. Davis examined Rafael Cabrera on July 10, 2013. Rafael Cabrera complained of neck and low back pain. He denied striking his head during the accident or bleeding. X-rays for his neck and back performed at the hospital were reportedly negative for fracture.

Examination of Rafael Cabrera's cervical spine revealed flexion measured at 25 degrees out of 45, extension 10-15 out of 30, lateral bending 25 out of 45 and rotation 40 out of 75, with pain at end points of all motion. There were positive Cervical Distraction and Foraminal Compression tests. Muscle strength of the neck was decreased secondary to pain. Motor strength of the upper extremities was a full 5/5 with no weakness attributable to neurological deficits.

Range of motion in the lumbar spine was measured at 35-40 degrees out of 90 in flexion, 5 degrees out of 30 in extension, 10 degrees out of 25 in lateral bending and 20 out of 45 in rotation. There was a negative Straight Leg Raising test. Valsalva tests and heel and toe walking were intact. Dr. Davis concluded that, if the history given was correct, there was a reasonable degree of medical certainty that Rafael Cabrera's "injuries" were caused by the subject motor vehicle accident. Those injuries were diagnosed by Dr. Davis as whiplash, traumatic cervical and lumbar herniated discs, radiculopathy and stenosis (narrowing), the latter condition apparently identified by the MRI report.

On August 13, 2013, Dr. Davis examined Rafael Cabrera again. Range of motion in his cervical spine was improved only slightly, but there was considerable improvement in range of motion in his lumbar spine. Flexion was 60 degrees out of 90, extension 20 degrees out of 30, and rotation 20 degrees out of 25. A Straight Leg Raising test was negative again. The plan was to continue with physical therapy.

When Rafael Cabrera was examined by Dr. St. Hill on September 24, 2013, his range of motion in the cervical spine decreased somewhat from the examination one month earlier in lateral bending and rotation. Range of motion in his lumbar spine plunged to 50 degrees out of 90 in flexion and 0 degrees out of 30 in extension. Dr. Hill found Straight Leg Raising to be positive.

The last examination by Dr. St. Hill on November 11, 2013 resulted in measurements of range of motion in Rafael Cabrera's cervical spine to be roughly the same as the month before. Range of motion in the lumbar spine was worse still than in September, with flexion measured at 60 degrees out of 90, extension at 0 degrees out of 30, lateral bending at 5 degrees out of 25, and rotation at 10 degrees out of 45. Straight Leg Raising, nevertheless, returned to its earlier negative status, as in July and August. Rafael Cabrera was discharged from physical therapy. Dr. St. Hill's final impression was "traumatic" cervical and lumbar pain syndrome "with documented herniated nucleus pulposus and radiculopathy".

Defendant Gray has demonstrated his entitlement to summary judgment regarding serious injury on the part of Rafael Cabrera. Rafael Cabrera testified that he was able to do "nothing" before the accident because of his age. He testified that he cannot do "anything" now because of his neck and back, without any further explanation. He also testified that he sweeps and washes dishes and otherwise helps out in the house with "everything". The bill of particulars, dated February 25, 2013, more than 180 days after the accident, alleges no more than two weeks incapacitation. Furthermore, all claimed injuries are alleged to be permanent, precluding a non-permanent, medically determined injury preventing Rafael Cabrera from performing substantially all his customary daily activities.

Dr. Margulies found only a minimal decrease in range of motion in Rafael Cabrera's neck and back, demonstrating degenerative change in this 89-year-old man. Otherwise, Dr. Margulies found no functional disability despite the plaintiff's advanced age.

Plaintiffs did not raise an issue of fact with their submissions in opposition. No evidence at all was offered of the first fourteen months of treatment reportedly received to show Rafael Cabrera's status post-accident, a significant gap in proof. No evidence was offered regarding the claimed exacerbation of Rafael Cabrera's pre-existing herniated disc at L4-5. The MRI reports clearly identify degeneration in the cervical and lumbar spine, which plaintiff's treating physicians simply ignored in attributing causation of the claimed injuries to the subject motor vehicle accident.

Rafael Cabrera's treating physicians did not identify the methods or standards used to measure range of motion, did not say whether movement was measured actively or passively, or offer any reflections to explain their inexplicably fluctuating results. Apart from improved flexion in the lumbar and cervical spine, from June 2013 through November 2013, Rafael Cabrera's physicians' records appear to show his range of motion in other planes worsening overall during the time they treated him. In August 2013, Dr. Davis found Rafael Cabrera could extend his lumbar spine 20 degrees out of a normal 30. By the time he discharged Rafael Cabrera from treatment at the end of November 2013, Dr. St. Hill reported Rafael Cabrera's ability to perform lumbar extension had disappeared altogether and now measured 0 degrees out of 30.

Dr. St. Hill did not offer his opinion regarding causation of Rafael Cabrera's "signs and symptoms" within a reasonable degree of medical certainty and his conclusion was vague and circumspect. He reported both "pain syndrome" and "traumatic" pain syndrome of the neck and

back “with” documented herniated discs. No explanation was offered for a finding of pain syndrome as well as one for traumatic pain syndrome. Dr. St. Hill left open any connection between the herniated discs and the pain syndrome.

Dr. Davis’ opinion was vague, concluding that the motor vehicle accident caused Rafael Cabrera to suffer “injuries”, not otherwise specified. The diagnostic list of the injuries Dr. Davis recorded included whiplash, hypertension, ulcers and prostate cancer, the latter resolved. Those injuries described as “traumatic” and roughly corresponding to the claims in the bill of particulars, were listed as various herniated discs, “as per MRI”. There is nothing in the MRI studies, however, that suggests traumatic etiology. On the contrary, the only information relating to causation in the MRI reports refers to a degenerative condition, “multilevel degenerative spondylosis” and a congenital partial fusion of the C3 and C4 vertebrae in the cervical spine. As for the lumbar spine, the study revealed “multilevel dehydration and desiccation”, contributing “hypertrophic facet disease” and mild scoliosis, a developmental condition. Neither Dr. St. Hill nor Dr. Davis offered any opinion as to how the subject accident might have exacerbated these pre-existing conditions.

RAFELLA COLLADO

The bill of particulars alleged that Rafella Collado (“Collado”) sustained herniated discs at L4-5 and L5-S1, foraminal stenosis, compression damage to C5, C6 and L5-S1 nerve roots, and exacerbation of pre-existing L4-5 herniated disc. She was incapacitated for at least two weeks after the accident and all her injuries are claimed to be permanent.

Collado testified that she was 54 years old at the time of the accident, 5’ 1” tall and weighed 180 pounds (deposition, September 4, 2013 at 9, 11). She never suffered a neck or back

injury prior to the subject accident (*id.* at 12). She had not worked outside the home for many years prior to the accident (*id.* at 10).

Collado's head and neck were contacted by one of the Toyota's air bags during the collision (*id.* at 25-27). She had a scratch on her face after the accident (*id.*). She was taken to a hospital where she was examined, her eyesight checked and the scratch on her face cleaned (*id.* at 33-35). No x-rays were taken (*id.* at 35). She was discharged the same day (*id.* at 33-35). Some time later she sought medical attention and physical therapy for her head, arm, back and hip (*id.* at 35-36). She underwent eight months of physical therapy and three injections to her neck and back (*id.* at 35-37).

Before the accident, Collado was very active at home and would cook, sweep, wash dishes, mop, clean, dust and iron (*id.* at 40-41). Now she cannot lift heavy items, clean, go food shopping, do laundry or carry her grandchildren (*id.* at 41-42). If she tries to do that, she feels "something back here" (*id.* at 42).

Dr. Margulies examined Collado on October 31, 2013, finding a 55-year-old woman complaining of pain in her neck, back and right shoulder and difficulty sitting and sleeping. She was found to have full range of motion in her cervical spine with flexion, extension and lateral bending at 45 degrees out of a normal 45, and rotation at 80 degrees out of 80. Dr. Margulies found no muscle spasm or tenderness. Her shoulders demonstrated full range of motion and no tenderness, heat, swelling, erythema or effusion. Impingement sign and apprehension tests were negative. Collado's lumbar spine had full range of motion and negative Straight Leg Raising and Patrick's tests. Dr. Margulies found no functional disability and no residual objective orthopedic findings. His diagnosis was sprain of the cervical and lumbar spine and right shoulder contusion,

all resolved.

In opposition to the motion, plaintiffs offered the unaffirmed MRI studies of Collado's cervical and lumbar spine and her certified medical records from Continental Medical, P.C. The cervical MRI study revealed all cervical discs to be desiccated. There was a large disc herniation at C4-5, and a small to moderate herniated disc at C5-6. Soft tissues were unremarkable.

The June 26, 2012 MRI study of Collado's lumbar spine revealed normal lordosis, multilevel dehydration and desiccation and moderate loss of disc space height at L5-S1 with mild to moderate foraminal stenosis at that level. Hypertrophic disease contributed to that herniated disc at L5-S1. There were bulging spinal discs at L3-4 and L4-5.

Collado was examined by Dr. St. Hill on June 4, 2013. She complained of neck and back pain, right arm pain, headaches and reliving the accident. Examination of her cervical and lumbar spine revealed "decreased" range of motion "with pain". Lasegue's test was negative and her gait was within normal limits. Dr. St. Hill's impressions were both "pain syndrome" and "traumatic" pain syndrome of the cervical and lumbar spine, "[u]nspecified myalgia/myositis" (muscle pain), strains, sprains, radiculopathy, sprain and strain of the hip, pelvis osteoarthritis, arthropathy/arthritis, and bursitis. He concluded the motor vehicle accident caused her "signs and symptoms" if her history was true.

On July 10, 2013, Dr. Davis examined Collado, finding a 54-year-old woman, 5' 1" tall weighing 180 pounds. She complained of neck and back pain, but denied headaches, radiating pain, numbness, tingling, shooting pain or weakness. She was found to have "functional" range of motion in her cervical spine at 40 degrees out of 45 in flexion, 25 out of 30 in extension, 40 out of 45 in lateral bending and 65 out of 75 in rotation. She had negative Valsalva, Cervical

Distraction and Foraminal Compression tests. Collado had 75 out of 90 degrees in lumbar flexion, 25 out of 30 in extension, 25 out of 25 in lateral bending and 40 out of 45 in rotation. Straight Leg raising and Valsalva tests were negative. Collado could perform a full squat with pain. Dr. Davis' diagnosis was whiplash, "traumatic" cervical and lumbar disc herniations as per MRI, and radiculopathy. He concluded the motor vehicle accident caused her injuries.

On August 13, 2013, Dr. St. Hill examined Collado again. This time she complained of neck pain and mid and low back pain. Dr. St. Hill found range of motion in her neck to be 40 degrees out of a normal 45 in flexion, 30 degrees out of 30 in extension, 30 out of 45 in lateral bending and 60 degrees out of 75 in rotation. Range of motion in her lumbar spine was measured at 70 degrees out of 90 in flexion, 20 out of 30 in extension, 20 out of 25 in lateral bending and 30 out of 45 in rotation. Straight leg raising was positive and there were areas of spasm and tenderness. His impression this time was traumatic cervical and lumbar pain syndrome and documented herniated discs. He noted that Collado rejected suggestions for epidural injections.

On September 24, 2013, Dr. St. Hill examined Collado and found essentially the same range of motion measurements in her cervical and lumbar spine, but a negative Straight Leg Raising test. She had full range of motion in shoulders but positive Neer, Hawkins and Apprehension tests.

On November 26, 2013, Collado expressed the same complaints of neck and back pain. Range of motion in her neck and back were identical to her September numbers with the exception of a 10 degree improvement in lumbar rotation. Straight Leg Raising inexplicably resulted in a positive finding again.

Collado's last examination by Dr. St. Hill occurred on December 17, 2013. Range of

motion in her cervical spine improved 5 degrees in rotation from her September and November examinations and otherwise remained the same in other planes. Her lumbar spine range of motion was full in flexion, and 20 degrees out of 30 in extension, although that plane of movement had been measured by Dr. St. Hill previously as a full 30 degrees out of 30 in both September and November. Straight Leg Raising tests were negative once again. Dr. St. Hill approved Collado for light work duties and discharged her from treatment.

Defendant Gray has established his entitlement to summary judgment regarding the alleged serious injury sustained by Rafella Collado as a result of the subject accident, which she has not refuted with admissible evidence. Gray met his burden with the examination by Dr. Margulies showing full range of motion in Collado's neck, a negative Straight Leg Raising test for her lumbar spine and the absence of tenderness or spasm in either area. His affirmed opinion was that she suffered no functional disability as a result of the subject accident. Collado alleged all her injuries are permanent, except for superficial cuts and bruises, precluding a finding that she suffered a non-permanent injury preventing her from performing substantially all her daily activities for 90 out of the first 180 days following the accident. In addition, she alleged only two weeks of incapacitation in her bill of particulars, which was dated more than 180 days after the date of the accident. A Note of Issue was filed on May 1, 2014, certifying that discovery is complete.

Plaintiffs' submissions in opposition do not raise an issue of fact for trial. Collado's range of motion measurements by her treating doctors are almost identical to those of defendants' examining physician, Dr. Margulies. Drs. Davis and St. Hill consistently found flexion and lateral bending in Collado's cervical spine to be 40 degrees out of 45, a deficit of no more than 5 degrees,

while Dr. Margulies found her capable of 45 degrees out of 45 in the same areas. On three separate occasions, including her last examination by Dr. St. Hill, Collado's treating doctors found Collado to have full extension in her cervical spine, in complete agreement with Dr. Margulies. At her last examination, Dr. St. Hill found Collado lacked no more than 5 degrees in cervical rotation out of a normal 75. Dr. Margulies found full cervical rotation.

Drs. Davis and St. Hill, at one time or another, found full range of motion in Collado's lumbar spine in flexion, extension and lateral bending. She was found to be lacking no more than 5 degrees in lumbar rotation in July 2013 by Dr. Davis and in December 2013 by Dr. St. Hill, compared to Dr. Margulies' finding of full lumbar rotation. Drs. St. Hill and Dr. Margulies agreed that she had a negative Straight Leg Raising test on those dates.

Collado's limitations in range of motion as found by plaintiffs' physicians were minimal. Even assuming the herniated discs had been shown to cause serious limitations, plaintiffs' physicians ignored other causative factors in the record. In attributing causation to the motor vehicle accident, they ignored the degenerative findings of multilevel desiccation and dehydration in Collado's cervical and lumbar spine. Both Dr. Davis and Dr. St. Hill were silent as to the alleged exacerbation of a herniated disc identified at L5-S1. They ignored the hypertrophic disease identified by the MRI study as a contributory factor to that herniated disc. Without at least addressing those factors, Collado's opposition to the motion is inadequate to raise an issue of fact. Finally, Dr. St. Hill found Collado capable of "light duties" at work, even though she has not worked outside the house for years.

In sum, none of the plaintiffs claimed a sufficient length of confinement after the accident to constitute a 90/180 serious injury, nor did they claim any non-permanent, medically determined

injuries which might have prevented them from carrying out substantially all their customary daily activities. All of the plaintiffs presented evidence of some level of limitation in range of motion in their necks and backs, but all also showed evidence of degenerative conditions in their MRI studies which were not dismissed by their treating doctors as causative factors, nor even addressed in any way. None of the plaintiffs offered medical records of their alleged previous treatments in the fourteen months following the accident, nor did they reveal the results of those treatments. Their treating doctors offered only vague and ambiguous conclusions regarding causation which are insufficient to establish causation for any one of their claimed injuries.

The complaint is, therefore, dismissed on the issue of liability as to Defendant Gray. Moreover, the complaint is dismissed in its entirety as to both remaining defendants for plaintiffs' failure to demonstrate they suffered serious injuries as a result of the subject motor vehicle accident.

Movant is directed to serve a copy of this order with notice of entry on the Clerk of Court who shall enter judgment dismissing the plaintiffs' complaint.

This constitutes the decision and order of the court.

Dated: September 29, 2014
Bronx, New York


BETTY OWEN STINSON, J. S.C.