

Uveges v Crill

2015 NY Slip Op 32510(U)

January 7, 2015

Supreme Court, Orange County

Docket Number: 2012/2013

Judge: Sandra B. Sciortino

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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X

CHRISTINE UVEGES,

Plaintiff,

-against-

RICHARD CRILL and MARGARET CRILL,

Defendants.

-----X

SCIORTINO, J.

DECISION AND ORDER

INDEX NO.: 2012/2013

Motion Date: 11/26/14

Sequence No. 1

The following papers numbered 1 to 18 were considered in connection with the application of defendants for summary judgment dismissing the Complaint:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Attorney's Affirmation/Exhibits A-D/ Affirmation of Hendler, MD (with Exhibits 1-2)/ Affirmation of Barie, MD (with Exhibit 1)	1 - 8
Affirmation in Opposition/Exhibits 1-5/Affirmation of Handago, MD/Affirmation of Kanter, MD/ Affidavit of Plaintiff/Exhibit 9	9 - 17
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Background and Procedural History

This personal injury action arises out of a motor vehicle accident that took place on September 8, 2012 on Route 211 in Wallkill, New York. Plaintiff commenced this action by filing a Summons and Complaint (Exhibit A to moving papers) on March 11, 2013. Defendants served a Verified Answer (Exhibit B) on or about April 2, 2013. Plaintiff thereafter served a Verified Bill

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of Particulars (Exhibit C) on or about November 7, 2013. The Examinations Before Trial of plaintiff and defendant Richard Crill were held on March 28, 2014; and a Note of Issue was filed on or about July 1, 2014.

Defendants move for summary judgment on the ground that plaintiff has failed to establish a serious personal injury in accordance with the threshold predicates of Insurance Law §5102. The motion was timely filed on August 29, 2014.

Plaintiff's Verified Bill of Particulars alleged that, as a result of the impact, plaintiff Christine Uveges sustained injuries including: (1) a full-thickness bursal-sided rotator cuff tendon tear with impingement syndrome, bursitis and synovitis, requiring arthroscopic surgery; (2) frozen shoulder syndrome; (3) restriction of range of motion with severe pain on movement and palpation; (4) stiffness, weakness and severe muscle spasms; with accompanying pain, swelling and tenderness; (5) a torn left medial meniscus requiring arthroscopic surgery, complicated by a deep vein thrombosis; (6) derangement, restriction of motion, spasms, stiffness, tightness and weakness; (7) loss of function in use of left knee; (8) C5-C6 disc bulge resulting in bilateral neural foramen stenosis; (8) restriction of motion, spasms and tenderness, stiffness, tightness and weakness; (9) loss of function in use of cervical spine, with accompanying severe pain, swelling and tenderness; (10) permanent injury to left shoulder, left knee and cervical spine; (11) post-traumatic functional impairment of the injured regions; (12) permanent total disability for a prolonged period of time; and (13) permanent partial disability and impairment up to and including the present time. (Exhibit C)

The relevant facts are:

On September 8, 2012, at approximately 11:30 a.m., plaintiff Christine Uveges was driving on Route 211 towards the Crystal Run Galleria Mall in Middletown, New York, while operating a

2001 Ford Expedition motor vehicle. A car (driven by a non-party) came from Route 17 and swung across into the lane in which plaintiff was traveling. A car in front of her stopped short, and she slammed on her brakes to avoid hitting that car. Defendants acknowledge that Christine Uveges' car was thereafter struck in the rear by a vehicle driven by defendant Richard Crill. (Exhibit D at pp. 16-17)

Just prior to the impact, plaintiff looked in her rear-view mirror and saw defendants' car coming. She braced herself and felt her left knee come up "like [she] was in a fetal position." (Exhibit D at page 18) She did not see the defendant's car slow down, or hear any squealing of tires. (Exhibit D at pp. 19-20) She believed defendants' car was traveling at 40-45 miles per hour when it struck her. (Exhibit D at page 21)

At the moment of impact, the car in front of plaintiff's had just begun to move again, and, although her car rolled forward after the impact, she did not strike the car in front. (Exhibit D at pp. 18-19) Plaintiff described the impact as "hard". (Exhibit D at page 19) Although plaintiff, who was seat-belted, braced against the impact, her left knee contacted the steering wheel. (Exhibit D at page 21)

When plaintiff exited her vehicle, she felt pain in her left shoulder, which she believed was from being hit while the seat belt was tight. The seatbelt caused black and blue marks on her collarbone region. (Exhibit D at pp. 22-23)

Both cars were driveable, and both drivers thereafter moved their cars to the Lowe's parking lot on the right side of the road. (Exhibit D at page 24) There was noticeable damage to the front of defendants' car, which had been under plaintiff's truck, but plaintiff did not notice damage to her vehicle, either at the scene of the accident, or afterwards. (Exhibit D at pp. 24-25, 29-32) The

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parties waited about a half hour for the police to appear. (Exhibit D at page 26) Afterwards, plaintiff returned to her home, took painkillers and lay down. (Exhibit D at page 35) Over the next several weeks, plaintiff developed shoulder, knee and neck pain, but she believed they would resolve themselves; instead, however, her symptoms worsened. (Plaintiff's Exhibit 8 at ¶¶ 11-12)

Approximately three weeks later, on October 2, 2012, plaintiff, as her condition was not getting better, went to Dr. Spina, a chiropractor with Dolson Medical. (Exhibit D at page 36; Exhibit 8 at ¶13) She had never treated with him before; nor had she ever injured her left shoulder, neck or knee before the accident. (Exhibit D at page 36, pp. 38-39) Plaintiff did not re-injure her shoulder, neck or knee after the accident. (Exhibit D at page 39) However, plaintiff did fall down her front steps prior to knee surgery; the fall occurred when her knee gave out. She did not receive any treatment for that fall. (Exhibit D at pp. 71-72)

On October 2, 2012, Dr. Spina performed x-rays of her shoulder and neck, and referred her to Dr. John Handago, an orthopedist, whom she saw for the first time on October 9, 2014. She had not seen Dr. Handago before the accident. (Exhibit D at page 40)

Plaintiff told Dr. Handago, at her initial visit, that her neck, left shoulder and left knee hurt her. (Exhibit D at page 43) He sent her for MRI testing. (Exhibit D at page 44) After he reviewed the results of the MRIs with her, plaintiff treated with Dr. Spina monthly, while also undergoing physical therapy at Dolson Medical three times per week. Her neck, left shoulder and left knee were all treated. (Exhibit D at pp. 44-47)

After six months, Dr. Handago told plaintiff that, if the therapy was not working, she would need shoulder surgery. (Exhibit D at page 47) On March 6, 2013, plaintiff underwent same-day arthroscopic surgery with Dr. Handago for the repair of a rotator cuff tear. (Exhibit D at page 48,

Exhibit 6) As a result of the surgery, she had three “holes” on her left shoulder and arm. (Exhibit D at page 49) She had further physical therapy on the shoulder after her surgery and continued to treat with Dr. Handago. (Exhibit D at pp. 49-50) When she complained that her arm was frozen, a second surgery was contemplated. (Exhibit D at page 51) However, she did not elect to have the other surgery, and her physical therapy continued in July 2013, when she underwent knee surgery. (Exhibit D at page 51)

Plaintiff claims that she still does not have 100% range of motion and has pain “every now and then.” She cannot sleep on her left shoulder or side. She cannot, without feeling pain in her shoulder, participate in rafting or perform the motions necessary for rafting, a prior activity. (Exhibit D at page 52)

On July 31, 2013, plaintiff underwent arthroscopic surgery on her left knee with Dr. Handago. (Exhibit D at page 53, Exhibit 6) Dr. Handago repaired a torn meniscus and removed cartilage. (Exhibit D at page 54, Exhibit 6) She has three or four circular scars, each a little smaller than a dime, approximately the same size as the scars on her shoulder. (Exhibit D at pp. 54-55)

One week after the knee surgery, plaintiff returned to the hospital, where it was discovered that she had a blood clot. (Exhibit D at page 56) She was placed on Coumadin and discharged to the care of a hemotologist. (Exhibit D at page 57)

She returned for physical therapy several weeks later, perhaps a month before her deposition in March 2014. (Exhibit D at page 60) In March 2014, she was no longer in physical therapy, because she did not have transportation to get there. (Exhibit D at page 61) She claimed that her knee is “doing pretty good, ” describing her pain as “down to a three” on a scale; however, she claimed she could not stand up straight. (Exhibit D at page 62)

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Since her surgeries, plaintiff can no longer run or speed-walk. (Exhibit D at page 64; Exhibit 8 at ¶17) Kneeling is painful, and she has difficulty with steps. (Exhibit D at pp.65-66, Exhibit 8 at ¶18)

Plaintiff was not employed outside the house at the time of the accident, but was paid by Rockland Psychiatric Center to care for adult mental health patients in her home, through the Family Care Program. (Exhibit D at page 67. Exhibit 8 at ¶19) She gives them their medications, takes them back and forth to doctors, cooks for them, does their laundry and cleans their rooms. She was unable to care for them for the first week after the accident. (Exhibit D at page 73) For five weeks after her accident, plaintiff paid a friend to help her with these tasks. (Exhibit D at pp. 67-70) Her husband also helped her for a month or two. (Exhibit D at page 73)

Motion for Summary Judgment

Defendants' Argument:

In support of their motion for summary judgment, defendants present the August 22, 2014 defense medical affirmation of Dr. Robert C. Hendler, and his report dated June 9, 2014. (Exhibit E to moving papers, with Exhibit 2) Dr. Hendler's report is affirmed in compliance with Civil Practice Law & Rules §2106 His report states that he reviewed the Bill of Particulars and a significant amount of pertinent medical records, including the records of Dolson Avenue Medical. He also reviewed CDs of plaintiff's MRI studies; including:

1. Left knee MRI performed October 16, 2012. Dr. Hendler's review found no meniscal tearing.
2. Left shoulder MRI performed November 13, 2012. Dr. Hendler's review found no rotator cuff tear.

3. MRI of cervical spine performed November 13, 2012. Dr. Hendler's review found a bulging disc at C5-C6.

Dr. Hendler examined plaintiff on June 3, 2014. On that day, plaintiff complained of mild, intermittent aches and pains in her neck, especially when turning her head to the left. There was no report of radiating pain into the arms, or numbness, weakness, or paresthesias. She complained of decreased motion in her left shoulder, and mild aches and pains, especially when reaching and with certain movements of the shoulder. She stated she had fairly constant ache and pain of her left knee. Although she reported no swelling, she stated the knee tended to buckle and lock, and she still had swelling in her left calf. She claimed to be unable to do certain activities of daily living. She had no other significant complaints.

Dr. Hendler conducted range of motion tests, by visual measurement, using normal range of motion values in accordance with the AMA Guide to the Evaluation of Permanent Injuries, 6th Ed.. He found full range of motion in the cervical spine, with normal values of flexion to 60 degrees, extension to 60 degrees, right rotation to 80 degrees, left rotation to 80 degrees, right lateral side bending to 45 degrees and left lateral side bending to 45 degrees. There was no spasm of the cervical paravertebral musculature. All joints of the upper extremities had full range of motion, and there was no atrophy in any muscle group in the upper extremities. Grip strength was 5+ and equal bilaterally. Triceps jerk was 2+ and equal bilaterally. Biceps jerk was 1+ and equal bilaterally. Brachial radialis was 1+ and equal bilaterally. Sensory examination with pin prick testing was normal, and there was no pain on palpation along the entire cervical spine.

Shoulder examination revealed three small arthroscopic surgical scars about the left shoulder. There was full range of motion in both shoulders, actively and passively, with normal values of 180

degrees of abduction, 45 degrees of adduction, 50 degrees of extension, 180 degrees of flexion, 80 degrees of internal rotation and 80 degrees of external rotation. There was no atrophy of either shoulder girdle musculature, and no palpable trigger zones or crepitus on range of motion of either shoulder. Hawkins, Neer and O'Brien's tests were negative bilaterally.

Examination of both knees revealed left knee arthroscopic scars. There was full range of motion with normal values of 0-140 degrees bilaterally. Neither knee had any joint line tenderness, nor was there any effusion in either knee. There was no ligamentous laxity to valgus or varus stress testing bilaterally. Anterior and posterior drawer and Lachman's tests were negative bilaterally. The left calf was approximately ½" larger than the right calf. There was a negative McMurray's test bilaterally. There was no atrophy of either thigh musculature, and no pain on palpation of either patella. There was no crepitus on range of motion. She walked with a normal gait.

X-rays taken on June 3, 2014 showed:

1. Cervical spine: Essentially normal overall alignment, with normal cervical lordosis. No significant degenerative change. No subluxations, fractures or dislocations. Disc spaces were well maintained.
2. Left knee: Joint space was well-maintained. No evidence of fractures or dislocations. Articular surface of the patella was free of arthritic or degenerative change. No evidence of soft tissue calcifications.
3. Left shoulder: No evidence of fractures or dislocations. Joint space was well-maintained. No evidence of periarticular soft tissue calcifications. Acromioclavicular joint was essentially anatomical. There was a suture anchor in the greater tuberosity.

Dr. Hendler opined that plaintiff suffered a cervical sprain. At the time of his examination, her cervical spine was completely normal. There were no positive objective tests to correlate with a herniated disc or cervical radiculopathy. It was his opinion that she had no present disability and no permanent findings which would be causally related to the accident. She required no orthopedic treatment for her cervical spine.

With respect to her left knee, Dr. Hendler concluded that the mechanism of injury given by plaintiff was consistent with a minor contusion on the steering wheel at the time of the accident. He opined that, had she suffered a torn meniscus, she would have been symptomatic, and would have required significant treatment prior to three weeks after the accident. He further opined that the MRI test of the left knee was completely normal, with no apparent torn meniscus; and that Dr. Handago's surgical findings did not correlate with the preoperative MRI. Dr. Hendler found some mild residual from the deep vein thrombosis, but no permanent functional loss of use of her left knee which was causally related to the accident; and no indication for further causally related orthopedic treatment.

Dr. Hendler found no mechanism of injury at the time of the accident to cause a rotator cuff tear. The findings on the MRI of impingement syndrome were, in his opinion, due to a pre-existing condition, and not caused by the accident. Had she sustained such a tear in the accident, she would have had immediate pain in her shoulder and would have had a mechanism of injury consistent with a rotator cuff tear. Dr. Hendler did not find the need for the left shoulder arthroscopy to be causally related to the accident. He found plaintiff had full range of motion in her shoulder and presents no current disability, with no permanent functional loss of use of her left shoulder which would be causally related to the accident.

Defendants further submit the Affirmation of Jacob J. Barie, MD, a board-certified radiologist. (Exhibit F to moving papers) Dr. Barie reviewed plaintiff's medical files and imaging studies, including the left shoulder MRI dated November 13, 2012, the left knee MRI dated October 16, 2012 and the cervical spine MRI dated November 13, 2012, as well as Dr. Hendler's report.

With respect to plaintiff's left shoulder MRI, Dr. Barie opines that there was an inborn impingement morphology, indicated by a downward sloping acromion. He found mild subacromial and subdeltoid bursitis, but no evidence of the bursal surface tear described at arthroscopy. The downward sloping acromion is an inborn condition not causally related to any traumatic event. The subacromial and subdeltoid bursitis were non-surgical and could be treated conservatively. His review did show a possible partial tear of the supraspinatus tendon along its articular surface, but he noted that Dr. Handago did not describe nor repair this finding. Instead, he repaired a bursal tear of the rotator cuff, not evident on the MRI.

Dr. Barie reviewed the November 13, 2012 MRI of plaintiff's cervical spine, and found it showed very mild degenerative disc disease, consistent with plaintiff's stated age. Cervical lordosis was entirely normal, with no evidence of postural adjustment to pain; and no post-traumatic changes to the cervical spine.

He found that coronal and sagittal views of the October 16, 2012 MRI of plaintiff's left knee failed to reveal any meniscal tear. While there was a small joint effusion without a Baker cyst, there was no evidence of significant meniscal or patellar derangement, or post-traumatic derangements such as bony contusion, fracture or soft tissue swelling. Dr. Barie opined that an impact of the left knee on the steering wheel would be unlikely to result in a tear involving the posterior horn of the medial meniscus, without some evidence of associated soft tissue swelling or

edema.

Dr. Barie concluded, with a reasonable degree of medical certainty, that the MRI studies of the neck, left knee and left shoulder demonstrated no acute post-traumatic derangements which would have been caused by the September 8, 2012 accident. (Exhibit F)

Based on Dr. Hendler's affirmed report and Dr. Barie's affirmation, defendants argue that plaintiff has failed to establish a "serious injury" as that term is defined in Insurance Law §5102(d).

That section provides, in relevant part, that:

A "serious injury" is a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss 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.

Defendants point to Dr. Hendler's report, which goes through each category of serious injury, and finds that there is no showing by plaintiff to satisfy those requirements; ie, she has no significant disfigurement; full range of motion; no permanent loss of use; no permanent consequential limitation of use, and no significant limitation. Moreover, she did not make a showing sufficient to meet show an inability to perform her usual activities for 90 out of 180 days following the accident.

Significant Disfigurement

Defendants assert that plaintiff, who was left with arthroscopic scarring from her knee and shoulder surgeries, did not suffer a significant disfigurement; but even if there had been significant

scars, because the surgeries were not causally related to the September 8, 2012 accident, the resulting scars would not be recoverable injuries.

Permanent Loss or Use of a Body Organ, Member, Function or System

Plaintiff did not suffer the requisite permanent total loss, or consequential or significant partial loss of the use of a body organ, member, function or system. Dr. Hendler's report demonstrates that plaintiff has full use of her shoulder, knee and neck; and Dr. Barie confirms that the MRI studies were either entirely normal or degenerative in nature, and not post-traumatic. Hence, there was no traumatically-induced serious injury that required surgery; but even if there had been, plaintiff did not suffer any total loss with respect to her neck, knee or shoulder.

Permanent Consequential or Significant Limitation

Defendants assert that the circumstances of plaintiff's accident, in which her car sustained no damage, and from which she had only left shoulder pain as she left the scene, a condition for which she sought no medical attention for several weeks, did not create the traumatic injuries of which plaintiff complains.

Dr. Hendler's affirmation showed that plaintiff's neck, for which she received only physical therapy treatments, has full and normal range of motion, with no positive objective test findings, and no neurological deficits. Apart from mild degenerative disc disease consistent with her age (as noted by Dr. Barie in his report), plaintiff has no qualifying serious injury. As stated above, it is the opinion of both of defendants' doctors, with a reasonable degree of medical certainty, that there are no permanent findings causally related to the accident.

Similarly, it was Dr. Hendler's opinion, with a reasonable degree of medical certainty, that there was no mechanism of injury which could have caused the rotator cuff tear repaired by Dr.

Handago. Dr. Barie found the impingement syndrome revealed by the MRI test to be due to a pre-existing condition, and not one caused by the accident. Regardless, apart from the three small scars, plaintiff had full range of motion in both shoulders, without atrophy or trigger zones or crepitus. Dr. Hendler opined that the need for the shoulder surgery was not causally related to the accident.

Dr. Barie opined that the impingement morphology indicated by the downward sloping acromion is an inborn phenomenon, and not traumatically-related. He found that the MRI showed no evidence of a bursal surface tear. The bursitis conditions were non-surgical and could be treated conservatively. Otherwise, plaintiff had no injury to her left shoulder as a result of the accident.

Dr. Hendler believed that plaintiff might have had a minor contusion of her left knee when it came into contact with the steering wheel. However, her ability to drive from the scene, and her failure to seek treatment for three weeks is inconsistent with a finding of torn medial meniscus. Moreover, the MRI of October 16, 2012 was normal. Hence, the need for left knee surgery is not causally related to the accident. That opinion was confirmed by Dr. Barie's affirmation.

90/180

Defendants point to Dr. Hendler's report which opines that plaintiff would not have had any restrictions, as there was no causally related injury; and that no injury would have prevented her from her usual and customary daily activities for the requisite time.

Moreover, although plaintiff hired someone to help her care for her resident patients for five weeks, that time was insufficient to meet the standard of curtailment of activities to a great extent.

Defendants conclude that based on the medical proof as adduced by their physicians, plaintiff cannot make a *prima facie* case of serious injury as required by Section 5102 of the Insurance Law.

Plaintiff's Opposition

In opposition to the motion, plaintiff argues that defendants failed to sustain their burden, regardless of the sufficiency of plaintiff's papers; and that plaintiff need not come forward with proof of serious injury unless and until defendants present admissible evidence that plaintiff has no cause of action. In support of that argument, plaintiff claims that she had never been injured nor had treatment for conditions in her neck, left shoulder or left knee prior to the accident of September 8, 2012. After the accident, she began experiencing pain in those areas, but assumed it would simply go away. The pain worsened instead. (Exhibit D at page 36; Exhibit 8)

On October 2, 2012, approximately 3 weeks after the accident, plaintiff presented at Dolson Avenue Medical for a chiropractic examination and treatment, and began a long course of physical therapy. She complained of pain in her left shoulder, left knee and neck that day. (Exhibit D at page 36)

In further support of her opposition to summary judgment, plaintiff offers medical records of Chiro Care (Exhibit 2), Middletown Physical Therapy (Exhibit 3), Dr. Handago (Exhibit 4); and the North Jersey Center for Surgery (Exhibit 5). She also submits the affirmed reports of Dr. Handago (Exhibit 6) and Dr. Kanter (Exhibit 7), whose report includes as an exhibit EMG studies conducted by Middletown Physical Therapy. For the reasons discussed below, only the reports of Drs. Handago and Kanter have been considered with respect to this motion.

Dr. Handago's report recites plaintiff's history with his office, from October 9, 2012 through May 12, 2014. Upon his initial examination, he found that the cervical spine range of motion was diminished, with spasm present upon palpation. A cervical compression test was positive to the left. Her biceps reflex was I-II/VI on the right and II-III/VI on the left. Left triceps was I-II/VI and

right triceps was II-III/VI.

Range of motion was diminished and painful in the left shoulder, with a positive impingement sign, supraspinatus sign and rotator cuff sign.

The evaluation of her left knee revealed tenderness to the medial and lateral joint lines to palpation, with a positive Steinman test and a positive McMurray's test medially for meniscal cartilage tear.

A course of physical therapy was prescribed for all three conditions.

On her next visit, on November 8, 2012, plaintiff reported continuing pain. Her left knee was still tender, and there were again positive Steinman's and McMurray's tests, although the range of motion was acceptable. Her left shoulder once again had positive impingement sign, supraspinatus sign and rotator cuff sign. O'Brien signs were also tested and positive. Range of motion in the shoulder was diminished and painful.

MRI tests were ordered; and physical therapy continued.

Plaintiff returned on December 13, 2012 and February 14, 2013 for reevaluation of the neck, knee and shoulder. She was having continued pain. Cervical spinal range of motion was diminished with spasm present to palpation. Left shoulder examination was essentially the same as on earlier evaluations. Arthroscopic surgery of the left knee was first discussed on the February 14, 2013 visit; and plaintiff was advised to consider this in the future. Dr. Handago opined on that day that all the injuries were related to the accident of September 8, 2012.

Arthroscopy was performed on March 6, 2013, and revealed a full thickness bursal sided rotator cuff tear, which was repaired arthroscopically. A course of physical therapy for the repaired shoulder was started on March 14, 2013 and continued through visits in May and June of 2013.

In June 2013, plaintiff reported continued pain, especially in her left knee. Although physical therapy continued at that point, on July 31, 2013, plaintiff underwent arthroscopy of the left knee, revealing a torn medial meniscus, which was surgically repaired, together with an Outerbridge grade 3-4 medial femoral chondral defect and chondromalacia and synovitis.

Subsequent to the knee surgery, plaintiff was admitted to Bon Secours Hospital for deep venous thrombosis (DVT), and placed on Coumadin. She was re-evaluated by Dr. Handago on August 15, 2013, and found somewhat limited range of motion with flexion, and diffuse tenderness. Both Steinman's and McMurray's tests were negative. She continued treating monthly with Dr. Handago although she was unable to participate in physical therapy until the DVT was completely resolved, in November 2013. Physical therapy continued thereafter through March 2014.

Dr. Handago last evaluated plaintiff on May 12, 2014 for her left shoulder and knee conditions. He found diminished and painful range of motion in the shoulder, with weakness of abduction and external rotation. Other objective signs were negative. Her left knee remained tender along the course of the gastroc musculature, and lacked 5 degrees from full extension, with muscle atrophy present. Her gait pattern was antalgic.

His summary concluded that, while plaintiff's cervical spine injuries resolved conservatively, her left shoulder and knee required surgical intervention. It is Dr. Handago's medical opinion that all of the injuries to cervical spine, knee and shoulder, were the result of the motor vehicle accident of September 8, 2012. He further opined that plaintiff will have permanency, and her prognosis was fair. (Exhibit 6)

Dr. Miriam Kanter, a physiatrist, evaluated plaintiff on October 2, 2014. Her affirmation (Exhibit 7) notes that, despite the surgeries, plaintiff continued to complain of moderate pain in her

left knee, with intermittent buckling and ongoing diminished mobility. She also has low level persistent pain in her left shoulder with diminished mobility; as well as moderately severe to severe neck pain, radiating down her left upper extremity to her hand. She had difficulty rising from a chair, negotiating stairs and kneeling. She walks with a limp, has difficulty reaching overhead and cannot engage in high impact activities.

Dr. Kanter's examination revealed mild effusion of the left knee and retropatellar tenderness. Range of motion was limited by 33%, with five degrees of extension lacking.

Examination of plaintiff's left shoulder showed atrophy of the left rotator cuff musculature, and limited range of motion between 11% in forward flexion and 44% in internal rotation.

Her cervical spine examination reveals tenderness to palpation and myoplasms of cervical paraspinal muscles. She had prominent trigger points, and limited range of motion between 20 and 30%. Her sensation was diminished to light touch and pin prick.

Dr. Kanter opined that, with a reasonable degree of medical certainty, there is a direct causal relationship between the September 8, 2012 accident and the resultant limitations and injuries described in her report.

Her affirmation further rebuts the conclusions of Drs. Hendler and Barie. Specifically, she argues that there is nothing in plaintiff's history that would explain a pre-existing "inborn morphology" referenced in Dr. Barie's affirmation. She attributes the cause of the impingement syndrome to the tightening of plaintiff's seat belt at the impact, and disagrees that the downward slope of the acromion establishes that condition as inborn. Dr. Kanter further opines that meniscal tears are generally traumatically caused, and that, with a reasonable degree of medical certainty, plaintiff's condition was caused by the accident.

Dr. Kanter notes that the absence of the findings of the rotator cuff tear or the meniscal tear on the MRI studies is not in itself negating of their existence; Dr. Handago's personal observations of these conditions are in fact, dispositive of them.

Finally, she disputes the conclusion of the doctors that plaintiff's 3-week delay in seeking treatment contraindicates causality. In her experience, the pain associated with rotator cuff tears, as well as meniscal tears often, starts dully and sharpens over time.

Based on her examination of plaintiff on October 2, 2014, two years from the accident, Dr. Kanter concludes that her condition is permanent.

Delay in Treatment:

Plaintiff argues that she has adequately explained any delay in her treatment; and that Dr. Kanter's affirmation supports the reasonableness of her explanation. Regardless, a delay in treatment would go only to the credibility of her complaints, and does not support defendants' motion for summary judgment.

Dr. Hendler's Range of Motion Findings are Inadequate:

Dr. Hendler's report gives only one value regarding his range of motion findings, coupling them with terms such as "normal," suggesting that these create the impression that every actual finding fell within the normal range. Plaintiff argues that Dr. Hendler's failure to specifically compare plaintiff's each range of motion finding to normal findings constitutes a failure as a matter of law, to supply the requisite comparisons.

Moreover, given the fact that there was no evidence of any pre-existing injury or condition to plaintiff's cervical spine, left shoulder or left knee, it became incumbent upon defendants' experts to establish an objective basis by which they could conclude that the accident neither caused nor

exacerbated the conditions observed by Dr. Handago. Plaintiff disputes that Dr. Hendler's and Dr. Barie's reliance on the MRI findings was sufficient, and point to Dr. Kanter's explanation that the negative MRI does not, of itself, negate the existence of the injuries. As Dr. Kanter opined, it was Dr. Handago's surgical observation which is dispositive. To assert that they were pre-existing conditions is nothing more than conclusory and insufficient to support summary judgment.

Hence, plaintiff asserts, defendants have failed to establish the absence of a serious injury.

The Serious Disfigurement Claim is for the Jury

Plaintiff asserts that Dr. Hendler is not qualified to determine whether plaintiff's scarring is a significant disfigurement; and that such a determination is left to the jury. As such, his opinion in that regard is without probative value.

Plaintiff's Expert Reports Sufficient Establish Serious Injury:

Plaintiff argues that defendants have failed in their initial burden to present a *prima facie* case that there was no serious injury. Regardless, however, the affirmations of Drs. Handago and Kanter more than adequately establish the existence of serious injury; including a causally related disc bulge, meniscus tear and rotator cuff tear. They establish that plaintiff's injuries are also permanent and significant, in the loss of range of motion, and detectable pain, tenderness and spasm.

Moreover, the affidavit of plaintiff, largely reiterating her deposition testimony, shows that, as a result of her neck, shoulder and knee pain, she could not perform the services necessary to care for the mental health patients who reside in her home, and had to hire a friend to help her for five weeks, and to rely on her husband for two months thereafter. In addition, plaintiff can no longer engage in running and speed walking, and ordinary activities such as stair-climbing, due to instability in her knee. Those conditions have continued, and sufficiently establish the 90/180 claim.

Discussion

Section 3212(b) of the Civil Practice Law & Rules states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." *Anyanwu v Johnson*, 276 AD2d 572, 714 NYS2d 882 [2d Dept 2000]. Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]. In deciding the motion, the Court must view the evidence in the light most favorable to the non-moving party. *See, Kutkiewicz v Horton*, 83 AD3d 904, 920 N.Y.S.2d 715 [2d Dept 2011].

Defendants move for summary judgment pursuant to Civil Practice Law & Rules §3212 claiming that plaintiff has failed to meet the threshold requirements of Insurance Law §5102, because plaintiff has not provided proof that she sustained a serious injury sustained as a result of the accident.

Defendants assert that the evidence supports a finding that plaintiff's cervical spine condition resolved itself shortly with conservative treatment, and that her shoulder and knee conditions were unrelated to the subject accident. Their expert report shows that there is no evidence, apart from the conclusory and self-serving allegations contained in plaintiff's affidavit, to suggest that she had any causally-related limitation or impairment sufficient to meet the requirements of "serious injury" as defined by Insurance Law §5102(d)

Defendants bear the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury. *Toure v. Avis Rent-A-Car Sys.*, 98 NY2d 345 (2002) Where the argument relies on the findings of defendants' witnesses, the findings must be in admissible form, and not unsworn reports, in order to demonstrate entitlement to judgment as a matter of law. *Pagano v. Kingsbury*, 182 AD2d 268 (2nd Dep't 1992) Defendants have submitted the affirmed statements of Drs. Hendler and Barie, in support of their application.

The Court has examined the range of motion report of Dr. Hendler, and, although plaintiff correctly notes that the examiner must compare his findings to what is normal, *Walker v. Public Adm'r of Suffolk County*, 60 AD3d 757 (2nd Dep't 2009), plaintiff has not cited any requirement of any particular form of language to be used. The findings of Dr. Hendler, while perhaps more awkwardly stated than those of other doctors, sufficiently establishes that the actual ranges of motion fall within the normal range.

By their reliance on the affirmed reports of Drs. Hendler and Barie, both of which deny the causal relationship between the knee and shoulder injuries and the accident, and which dismiss as insignificant the cervical spinal injury, defendants initially met their *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the accident. *See, Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 (2002); *Gaddy v. Eyler*. 79 NY 2d 955 (1992)

Once a defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard. *Heege v. Falisi*, 2013 WL 3713600 (Slip. Op., Suffolk Co. 2013) In light of defendants'

showing, the burden shifted to plaintiff to demonstrate, by admissible evidence, that her injuries meet the threshold of Insurance Law §5012(d).

Defendants argue, in their reply affirmation, that the records of Chiro Care, Middletown Physical Therapy and North Jersey Center for Surgery constitute inadmissible evidence, and, as such, are of no probative value. The Second Department has made it clear that plaintiff may not rely on unsworn medical evidence to establish a serious injury. *See, Pagano v. Kingsbury, supra*, 182 AD2d at 270; *Friedman v. U-Haul Truck Rental*, 216 AD2d 266 (2nd Dep't 1995) (plaintiff may not rely on an unsworn report, and plaintiff's doctor may not rely on an unsworn MRI report, prepared by another doctor)

Section 4518 of the Civil Practice Law & Rules provides that a medical record is admissible provided that it bears a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee designated for that purpose or by a qualified physician.

While the purported certifications appended to each of those exhibits establishes, in conformance with section 4518, that the signor was "qualified to make this certification;" the records were both accurate and complete; and they were made by personnel or staff of the office in the regular course of business, none of the certifications identifies signor¹ or that person's title in order to indicate that he or she was an employee delegated for that purpose. The Court finds such certifications to be inadequate to properly place the records before the Court as a business record exception to the hearsay rule, and as such, they have not been considered. *Irizarry v. Lindor*, 110

¹The Court notes that the signatures appear to be the same on the certifications by Chiro Care, Middletown Physical Medicine and Middletown Physical Therapy.

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The records of Dr. Handago are certified by him, and were considered by the Court, together with his report. Dr. Kanter's affirmation is likewise admissible, although the exhibit is not.

Significant Disfigurement:

A significant disfigurement is defined as a condition which is "unattractive, objectionable, or the object of pity and scorn." Insurance Law §5102(d). It is undisputed that plaintiff bears three small scars, each the size of a dime or smaller, on her shoulder and three more of the same size on her knee. Defendants assert that even if the surgeries which created those scars are causally-related, which they dispute, the resultant scars do not constitute significant disfigurement.

Plaintiff argues that the question of the significance of the scars is for the jury only.

Although the question of whether a plaintiff has suffered a serious injury is usually for the jury, it is incumbent upon the court to decide in the first instance if "reasonable people could differ as to whether plaintiff's scar was a 'significant disfigurement'" *Edwards v. DeHaven*, 155 AD2d 757 (3rd Dep't 1989) quoting, *Prieston v. Massaro*, 107 AD2d 742. Small, well-healed scars do not constitute a significant disfigurement in accordance with Insurance Law §5102(d). *Santos v. Taveras*, 53 AD3d 405 (1st Dep't 2008)

In the instant matter, a reasonable person viewing the plaintiff's shoulder or knee in their altered states would not regard them as unattractive, objectionable or the object of scorn or pity. Thus, defendants' motion for summary judgment on the ground of significant disfigurement is granted.

Other Serious Injury:

The admissible findings of Drs. Hendler and Barie and the admissible findings of Drs. Handago and Kanter are in conflict regarding the causation of plaintiff's injuries, as well as the significance of limitation, and the permanence of those limitations, if any. Each expert has presented results of objective testing in support of his or her conclusions, and none relies on mere conclusory observations unsupported by data. *Compare, Paradizov v. Doan*, 46 AD3d 787 (2nd Dep't 2007) (where experts' opinions were not based on objective, evidentiary bases, they were insufficient to sustain summary judgment); *Pommells v. Perez*, 4 NY 3d 566 (2005) (mere conclusory notation that the injury was unrelated to the accident was insufficient)

Conflicting expert opinions generally raise triable issues of fact. *Garcia v. Long Island MTA*, 2 AD3d 675 (2d Dep't 2003) In the instant matter, there are significant triable issues of fact, including the causal relationship between the mechanism of the accident and plaintiff's rotator cuff injury and her torn meniscus, the length of any limitations, and the permanence of any limitations. These raise sufficient issues of fact for determination by the trier of fact. *Pommells v. Perez, supra*, 4 NY 3d at 387

Accordingly, with the exception of the claim for significant disfigurement, defendants' motion for summary judgment on the threshold issue of serious injury must be denied.

This decision shall constitute the order of the Court.

Dated: January 7, 2015
Goshen, New York

ENTER


HON. SANDRA B. SCIORTINO, J.S.C.