Grant v L.I. Yellow Airport Serv., Inc.
2018 NY Slip Op 34189(U)
November 1, 2018
Supreme Court, Nassau County
Docket Number: Index No. 608737-16
Judge: Steven M. Jaeger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 35
____X

ZALIQUA GRANT,

Plaintiff,

-against-

L.I. YELLOW AIRPORT SERVICE, INC., GEORGIOS KOHLIOS and ROBERT A. FRANK,

Defendants.
____X

Index #: 608737-16
Motion Sequence Nos. 001,002,003
Mot. Submitted: 10/16/18

Present: Hon. Steven M. Jaeger
Decision & Order

Papers submitted on the motion:	
Notice of Motion, Affirmation & Exhibits	X
Affirmation in Opposition & Exhibits	X
Reply Affirmation	X
Notice of Cross Motion, Affirmation & Exhibits	X
Affirmation in Opposition & Exhibits	X
Reply Affirmation	X
Notice of Motion, Affirmation & Exhibits	X
Affirmation in Opposition & Exhibits	X
Affirmation in Opposition & Exhibits	X
Reply Affirmation	

Defendants, L.I. Yellow Airport Service, Inc. and Georgios Kohlios, move [Mot. Seq. 001], for an Order, awarding them summary judgment dismissing the plaintiff Zaliqua Grant's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). The motion is denied.

Defendant, Robert Frank, moves [Mot. Seq. 002], for an Order, awarding him summary judgment dismissing the plaintiff Zaliqua Grant's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). The motion is denied.

Defendants, L.I. Yellow Airport Service Inc. and Georgios Kohlios, move [Mot. Seq. 003], for an Order, pursuant to CPLR 3212, awarding them summary judgment dismissal of the plaintiff's claims and defendant Robert Frank's cross claims against them on the issue of liability. The motion is granted.

This action arises out of a motor vehicle accident which took place on January 21, 2016 at approximately 9:15 p.m.[1] in the parking lot located at 202 Old Country Road, Hicksville, New York (Bill of Particulars,¶4).[2] At the time of the accident, plaintiff, Zaliqua Grant ("Grant") was a passenger in a vehicle owned by defendant L.I. Yellow Airport Service, Inc. ("Yellow") and driven by defendant Georgios Kohlios ("Kohlios") when it was allegedly struck by the vehicle owned and operated by defendant Robert Frank ("Frank"). At the time of the accident, plaintiff was seated in the backseat, on the right side – behind the front passenger seat of the taxi cab (Grant Tr., p. 8).[3] Notably, the taxi cab driver, defendant Kohlios, was in the vehicle when the accident occurred (10).

According to the plaintiff, the taxi cab that they were in had pulled into a shopping center to make a stop at a liquor store (10). Plaintiff testified that when they got to the shopping center, the taxi stopped in front of the liquor store (16-17) at the plaintiff's boyfriend, non-party, Ivan Garris, request (17, 19). Plaintiff stated that she never saw the defendant Frank's vehicle prior to its collision

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[1]While the plaintiff's bill of particulars lists the time of the accident as 9:15 p.m., at her oral examination before trial, plaintiff approximates the time of the accident as 4:15 p.m. (Grant Tr., p. 11). This is confirmed by defendant George Kohlios who testified that the accident occurred between approximately 4:30 to 5:00 p.m. (Kohlios Tr., pp. 19-20).

[2]Despite being labeled "Verified Bill of Particulars", there is no "Verification" by the plaintiff.

[3]Also in the cab was her nine year old son who was seated in the back seat, behind the driver (9). There is no claim in this action brought on behalf of the infant son.

with the taxi cab in which she was a passenger (21). She claims that she later learned that the impact was the result of the other driver, defendant Frank, backing out of his parking spot. The impact occurred to the rear passenger side of the taxi cab – i.e., where the plaintiff was seated. Plaintiff stated that as a result of the impact, her knees hit the seat that was in front of her and her head and shoulder hit the window and the door (44). Plaintiff stated that she was wearing a seatbelt at the time of the impact which she described as "heavy" (23, 44).

The police arrived at the accident site (25). Plaintiff declined an ambulance (43). Following the accident, the taxi drove the plaintiff (and her son and boyfriend) to her home (24, 26). Plaintiff confirmed that at no point did she ask the taxi driver to take her to a hospital or a medical office (24).

Plaintiff first sought medical attention two days after the accident when she presented to Nassau University Medical Center with complaints of pain in her knees, shoulders, neck, back and stomach (27). She was treated and released from the emergency room on the same day (29).

Plaintiff testified that at the time this accident, she was employed, full time, as a "Person Care Aid" (PCA) for First Care Home Care agency (13-14).[4] She added that she had worked earlier in the day on the date of this accident helping to take care of a patient in their home in Queens (15). She also testified that, as a result of this accident, she missed "three or four days" from work (26).[5] Ultimately, she was laid off in August 2016. She stated that this was the last time that she worked

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[4]Again, despite having testified to being employed at the time of the accident, in her bill of particulars, plaintiff claims that she was not employed at the time of the accident (Verified Bill of Particulars, ¶¶14, 16).

[5]Similarly, contrary to the plaintiff's sworn testimony, in her bill of particulars, plaintiff claimed that she was "confined to the bed for a period of approximately five (5) to six (6) weeks, except having to leave the bed for her necessary doctor's appointments (Verified Bill of Particulars, ¶13).

on a full time basis (37). Plaintiff stated that prior to being laid off, she continued to work as a home care attendant which work included doing things like cooking, cleaning and running errands for that specific patient (35, 56).

As to activities, plaintiff testified that, as a result of the injuries sustained in this accident, she can no longer stand or hold her infant daughter for extended periods of time (40). Nor can she really clean or "move the way [she] used to" (40). Plaintiff stated that it is now difficult for her to get out of bed because of pain in her shoulders, that she has trouble sleeping because of her pain in her shoulders and knees, and that she has difficulty lifting up (40). She also stated that she can no longer run, dance or do anything with her children (40-41).

Plaintiff testified that her being laid off from work as a PCA "could have [had to do with the subject accident] because I wasn't able to do what I usually do"(37). She stated that she has collected unemployment insurance benefits since August 2016 (38) and that as part of that process, she has certified that she is healthy enough to work if she found work (38).

Plaintiff testified that she was never previously involved in any type of car accident (28); nor had she injured her knees, shoulders, neck, back or stomach ever before (27-28). Plaintiff added that she has also never subsequently been involved in any car accident or has re-aggravated the injuries sustained herein (28).

The plaintiff testified that at the time of the accident, she was pregnant, albeit very early in her pregnancy (19-20). The plaintiff gave birth to a healthy baby girl nine months after the accident - in September 2016 (19). In addition, she stated that at the time of the deposition, in December 2017, plaintiff was again pregnant (41).

Upon the instant motions, the defendants Yellow and Kohlios, and defendant Frank, respectively seek summary judgment dismissal of the plaintiff's complaint on the grounds that her injuries do not satisfy the serious injury threshold of Insurance Law §5102(d).

Initially it is noted that defendant Robert A. Frank adopts and incorporates the arguments and proof submitted by defendants Yellow and Kohlios in support of their motion for summary judgment on the grounds that the plaintiff did not sustain a serious injury. Accordingly, the motions will be addressed concurrently.

"Serious injury" is defined by § 5102(d) of the New York Insurance Law as follows:

> A personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such persons' usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment. (Ins. Law § 5102(d)).

The law provides that by establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law § 5102 (d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident (*O'Neill v O'Neill*, 261 AD2d 459, 460 [2nd Dept. 1999]; *Prieston v Massaro*, 107 AD2d 742, 743-744 [2nd Dept. 1985]).

Plaintiff, who was 25 years old at the time of this accident, claims that, as a result of this accident, she sustained, *inter alia*, supraspinatus tendon tear, left shoulder; labral tear, left shoulder; slap tear, left shoulder; interstitial tear of the supraspinatus tendon, right shoulder; labral tear, right shoulder; slap tear, right shoulder; tear of the medial menisci, left knee; tear of the lateral menisci, left knee; partial tear of the proximal insertion of lateral collateral ligament, left knee; tear of the

medial menisci, right knee; tear of the lateral menisci, right knee; and, diagnostic arthroscopy of the right knee, operative arthroscopy of the right knee, partial medial meniscectomy and shaving of the medial meniscus, right knee, partial lateral meniscectomy and shaving of the lateral meniscus, right knee, chondroplasy of the patella, right knee, and, tricompartmental partial synovectomy, right knee (Bill of Particulars, ¶11).

Notably, the plaintiff claims that her injuries fall within the following five categories of the serious injury statute: to wit, significant disfigurement; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and 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 (Bill of Particulars, ¶20).

Based upon a plain reading of the papers submitted herein, however, it is clear that the plaintiff's injuries do not satisfy the "significant disfigurement" category of Insurance Law §5102(d). Specifically, the plaintiff's failure to claim, let alone establish through admissible evidence, that she has sustained a condition that a reasonable person would view as unattractive, objectionable, or as the subject of pity or scorn (*see*, *Tugman v. PJC Sanitation Service, Inc.*, 23 AD3d 457 [2nd Dept. 2005]; *Sirmans v. Mannah*, 300 AD2d 465 [2nd Dept.2002]), is fatal to her attempt to establish a claim for serious injuries under this category.

Nor is there any evidence that the plaintiff's injuries satisfy the "permanent loss of use" category of the Insurance Law §5102(d). That is, the plaintiff's failure to allege and claim, much less

establish through admissible evidence, that she has sustained a "total loss of use" of a body organ, member, function or system, is fatal to her attempt to establish a claim for serious injury under this category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]).

Additionally, and notwithstanding the claims asserted in her bill of particulars, there is no evidence on this record that the plaintiff's alleged injuries satisfy the 90/180 category of the "serious injury" statute.

The law provides that under the 90/180 category, a plaintiff need not show a limitation that is "significant" or "consequential," but must show, by objective evidence, the existence of a medically determined injury or impairment of a non-permanent nature that affects substantially all of the material acts that constitute her daily activities for at least 90 days during the 180 days following the occurrence (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Blake v Portexit Corp.*, 69 AD3d 426 [1st Dept. 2010]).

Notably, the statutory requisite that injury be "medically determined" applies to "injury or impairment," not to the period of disability (*Shiner v. Insetta*, 137 Misc. 2d 1012 [App. Term, 2nd Dept. 1987]). Likewise, a plain reading of the statute confirms that the modifying phrase "nonpermanent nature" refers to both injury and impairment (*Wymer v. National Fuel Gas Distrib. Corp.*, 217 AD2d 920 [4th Dept. 1995]). In addition, the words "substantially all" as used in the statute are construed to mean that the person had been curtailed from performing his or her usual activities to a great extent rather than some slight curtailment (*Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]; *Kim v Cohen*, 208 AD2d 807 [2nd Dept. 1994]; *Thompson v. Abbasi*, 15 AD3d 95 [1st Dept. 2005]).

In the end, a medically determined injury is one that is supported by the testimony of a physician or a chiropractor. That is, the 90/180-day threshold is satisfied by evidence that the plaintiff's physicians placed restrictions on her activities (*see generally*, *Cummings v Jiayan Gu*, 42 AD3d 920 [4th Dept. 2007]). Significantly, general statements by the plaintiff or her physician that the plaintiff was advised to avoid certain activities or that the plaintiff was somewhat restricted in daily-living activities are not sufficient to establish serious injury under the 90/180 category (*Mercado-Arif v Garcia*, 74 AD3d 446 [1st Dept. 2010]; *Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [1st Dept 2008]). Instead, the plaintiff must submit expert medical evidence supporting the disability for the requisite period of time (*Blake v Portexit Corp.*, *supra*).

Initially, this Court notes that given the multiple discrepancies between her claims as asserted in her bill of particulars and her deposition testimony, this Court will give credence to her deposition which testimony was provided by the plaintiff under oath, rather than to her bill of particulars which the plaintiff never verified or otherwise swore to.

In that regard, this Court notes that the plaintiff testified that she only missed three or four days from work and that she continued to work as a home care attendant (which work involved things like cooking, cleaning and running errands for the patient) until she was laid off in August 2016. Moreover, she testified that, in her application for unemployment benefits (which she has been collecting since August 2016), she has certified that she is healthy enough to work if she found work. These sworn statements, together with the fact that she gave birth to a healthy baby girl in September 2016 – nine months following this accident – without incident, this Court finds that the injuries claimed by the plaintiff herein do not satisfy the 90/180 category of the serious injury statute.

Notably, despite the plaintiff's sworn testimony that she can no longer stand or hold her infant daughter for extended periods of time, that she can no longer "move the way [she] used to", that she can no longer run, dance or do anything with her children, this Court cannot find that any of these "limitations" or "restrictions" were the product of any "*medically* determined injury or impairment" thereby satisfying the 90/180 category of the "serious injury" statute.

In the end, the plaintiff's failure to substantiate her claims through competent, objective proof, that she sustained (1) a "medically determined injury or impairment"; (2) of a "non permanent nature"; (3) which has caused the alleged limitations on her *usual* and *daily activities*; and (4) that the curtailment of any such activities is "to a great extent", is fatal to her claim that his injuries satisfy the 90/180 category of the Insurance Law §5102(d) (*Licari v. Elliott*, *supra* at 236; *see also Sands v. Stark*, 299 AD2d 642 [3rd Dept. 2002]).

Thus, it is clear to this Court that the plaintiff's injuries herein also fail to satisfy the 90/180 category of the Insurance Law §5102(d) (*Galofaro v. Wylie*, 78 AD3d 652 [2nd Dept. 2010]; *Elshaarawy v. U-Haul Co. of Miss.*, 72 AD3d 878 [2nd Dept. 2010]).

Therefore, this Court will restrict its analysis to the remaining two categories of the serious injury statute as they pertain to the plaintiff herein; to wit, permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system.

Under the no-fault statute, to meet the threshold "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, the law requires that the body organ or member or a body function or system not operate at all or operate only in some limited way.

While it is not necessary for the plaintiff to establish "a total loss of the use" in the "permanent consequential limitation of use" and "significant limitation of use" categories, the limitations of use must nevertheless be consequential and significant, respectively, i.e., important or meaningful. The essential difference between the "significant limitation" category and the "permanent consequential" category is that "significant limitation of use" does not require that the limitation be total or permanent (*Lopez v Senatore*, 65 NY2d 1017 [1985]; *Estrella v GEICO Ins. Co.*, 102 AD3d 730 [2nd Dept. 2013]; *Partlow v Meehan*, 155 AD2d 647 [2nd Dept. 1989]; *Velez v Svehla*, 229 AD2d 528 [2nd Dept. 1996]). In either case, however, the law requires that the plaintiff's limitations be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v. Elliot*, *supra* at 236; *Gaddy v. Eyler*, *supra*).

That is, in order to constitute quantified proof of a medical injury or condition and in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Sys., supra*). Notably, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*Id*). Ultimately, however, a minor, mild or slight limitation, whether quantified or qualitatively established, is deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, *supra*; *Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. However, even where there is ample objective proof of

plaintiff's injury, the Court of Appeals held in *Pommells v. Perez,* 4 NY3d 566 (2005), that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint. Specifically, in *Pommells v. Perez*, the Court of Appeals has held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Id*). Thus, to establish a claim for "serious injury" plaintiff must not only offer contemporaneous findings with the accident, but recent findings (based upon medical examinations) as well (*Perl v. Meher*, 18 NY3d 208 [2011]).

However, in 2011, the Court of Appeals clarified in *Perl v. Meher*, *supra*, that while the law requires both quantitative proof of a "serious injury" as well as "contemporaneous" evidence of a "serious injury", a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Perl v. Meher*, *supra*). Thus, when relying on the quantitative prong of *Toure v Avis Rent A Car Systems, Inc.*, *supra*, to establish a permanent consequential limitation of use and/or significant limitation of use based on a limitation of movement, a plaintiff is not required to submit quantitative range of motion findings "contemporaneous" to the accident (*Perl v Meher*, *supra*). Rather, the plaintiff may submit qualitative medical evidence establishing plaintiff's symptoms shortly after the accident, and quantitative measurements of range of motion taken later in preparation for litigation (*Id*). The qualitative evidence generated shortly after the accident serves to establish that the accident was a proximate cause of plaintiff's injuries, while the quantitative evidence generated in preparation for litigation serves to demonstrate the severity of plaintiff's injuries (*Id*).

Ultimately, in support of a claim that the plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (CPLR 2106; *Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept 1992]). It is only when the defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained that the burden shifts, making it incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim for serious injury (*Pommells v. Perez*, *supra*; *see also, Grossman v. Wright*, *supra* at 84). However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Otherwise, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*see Reid v. Wu*, 2003 WL 21087012 [Sup. Ct. Bronx 2003], *citing O'Sullivan v. Atrium Bus Co., Inc.*, 246 AD2d 418 [1st Dept. 1998]).

In support of their motion herein, the defendants submit, *inter alia*, the sworn report of Jeffrey Guttman, MD, FAAOS, an orthopedist, who performed an independent orthopedic evaluation of the plaintiff on February 26, 2018; and the sworn reports of A. Robert Tantleff, MD, a radiologist, who performed an independent radiological review of the MRI of plaintiff's right shoulder, left shoulder (each shoulder MRI dated September 22, 2016), right knee and left knee (each knee MRI dated September 21, 2016). (Both sets of MRIs were performed post delivery of the plaintiff's baby.)

Despite the defendants' submissions, this Court finds that the proof herein fails to establish their *prima facie* entitlement to judgment as a matter of law.

Specifically, this Court finds that the affirmed report of, Dr. Guttman, is wholly insufficient to demonstrate that the plaintiff's injuries do not meet the "serious injury" threshold of Insurance Law §5102(d). That is, in his affirmed report, Dr. Guttman notes that following his independent medical examination of the plaintiff, including quantified range of motion testing with a goniometer of plaintiff's shoulders and knees, and comparing his findings to normal range of motion values, there are restrictions in plaintiff's range of motion as follows:

> ***
> **Bilateral Shoulders**: Examination of the shoulders reveals range of motion of **forward elevation to 160 degrees (180 degrees normal)**, backward elevation to 40 degrees (40 degrees normal), **abduction to 140 degrees (180 degrees normal)**, adduction to 35 degrees (30 degrees normal; claimant exceeds normal value), **external rotation to 60 degrees (90 degrees normal)** and **internal rotation to 40 degrees (80 degrees normal).** The claimant has full strength all planes of shoulder motion. There are no abnormalities noted. There is no muscle atrophy or asymmetry. The clamant reports no tenderness. There is no instabilition on stress testing.
> ***
> **Right Knee**: Examination of the right knee reveals healed arthroscopic portals and range of motion of **flexion to 135 degrees (150 degrees normal)**. Extension is 0 degrees (0 degrees normal). There is no gross instability on stress testing. There is no soft tissue swelling noted. There is no instability to varus or valgus stressing at 0 or 30 degrees.
> ***
> **Left knee**: Examination of the left knee reveals negative effusion. Range of motion of **flexion is to 135 degrees (150 degrees normal)**. Extension is 0 degrees (0 degrees normal). There is no gross instability on stress testing. There is no soft tissue swelling noted. There is no instability to varus or valgus stressing at 0 or 30 degrees.
> ***
> (Motion, Ex. D [Emphasis Added])

Despite the foregoing findings, Dr. Guttman notes his "Impression" as follows:

IMPRESSION:

- Alleged injuries to the bilateral shoulders, resolved.
- Alleged injury to the left knee, resolved.
- Status post alleged right knee arthroscopic surgery, healed.

Ultimately, Dr. Guttman, opines, as follows:

> **DISCUSSION**:
> Based on today's examination, the claimant is capable of engaging in normal activities of daily living. There is no evidence of disability. **The decreased ranges of motion were on a voluntary basis and were due to claimant guarding. They were not supported by the remainder of the examination findings.** All orthopedic testing was negative, there were no muscle spasms or trigger points and reflexes, muscle strength, sensation and muscle tone were all normal. The clamant requires no further treatment.
> (*Id.* [Emphasis Added]).

This Court does not find Dr. Guttman's opinion to be sound or otherwise based on his objective findings. First, despite noting the reductions in movement, Dr. Guttman fails entirely to explain how said restrictions in plaintiffs' knees and shoulders is consistent with his medical opinion that all of Zaliqua Grant's injuries are "resolved." There is no explanation, let alone an adequate or sufficient reasoning, of his otherwise conclusory opinion that "the decreased ranges of motion were on a voluntary basis and were due to claimant guarding[...] [t]hey were not supported by the remainder of the examination findings." That is, while Dr. Guttman claims that "[t]he decreased ranges of motion were on a voluntary basis and were due to claimant guarding" and "not supported by the remainder of the examination findings" this Court does not find this to be the case. Indeed, based on a plain and simple reading of Dr. Guttman's sworn report in its entirety, "the remainder of the examination findings" were limited to other named tests which, contrary to Dr. Guttman's assertion, suggest a limitation of use.

For instance, Dr. Guttman's examination of plaintiff's bilateral shoulders included the following findings:

- Sulcus test - negative
- **Hawking's impingement sign – positive.**
- **Neer's impingement sign – positive.**
- Apprehension test – negative.
- Relocation test – negative.
- Cross body adduction test – negative

- Speed's test – negative.
- Yergason's test – negative.
- O'Brien's test – negative.

(*Id.* [Emphasis Added]).

In the end, when read as a whole, this Court cannot find that Dr. Guttman's report establishes their prima facie showing of entitlement to judgment as a matter of law (*cf. Dioguardi v. Weiner*, 288 AD2d 253 [2nd Dept. 2001]; *Beyel v. Console,* 25 AD3d 636 [2nd Dept. 2006]).

It is true that the defendants also rely on the MRI reports and radiological findings of Dr. Tantleff who in June 2017 performed an independent radiology review of the MRI of the plaintiff's (bilateral) shoulders and (bilateral) knees. These MRI scans were performed eight months after the date of accident (and post delivery of plaintiff's baby) in September 2016. Yet, this proof is also wholly deficient.

First, Dr. Tantleff explicitly states in his sworn report that he personally reviewed the actual MRI films from Precision Radiology. While this is an acceptable method of review (*Id.*), Dr. Tantleff's failure to pair his review with a physical examination of the plaintiff is fatal (*Id*; *see also, Silkowski v. Alvarez*, 19 AD3d 476 [2nd Dept. 2005]). This is especially true given that Dr. Tantleff's review of the MRI films was performed nine months after the MRI scans were performed.

Therefore, in light of the evidence on this record, this Court finds that the defendants have failed to carry their prima facie burden that the plaintiff has not sustained a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system."

Accordingly, the defendants' respective motions for summary judgment dismissal of plaintiff's complaint on the grounds that plaintiff has not satisfied the "serious injury" threshold requirement of Insurance Law §5102(d) are denied.

Defendants, Yellow and Kohlios, also move for summary judgment dismissal of the plaintiff's complaint on the issue of liability.

In support of their motion, the defendants rely principally upon the sworn deposition testimonies of the parties herein including the sworn testimony of defendant George Kohlios, the driver of the defendant taxi cab company, Yellow. In pertinent part, Kohlios testified as follows:

***

Q: Now, can you describe how the accident occurred in your own words?

A: Yes. I went to the right side where the liquor store is of the Plaza and it's a row of stores next to each other, and in front of the stores there are parking spots and they were all occupied, and I just went in front of the liquor store and I stopped my car with the engine running for – away from the parked cars, like six, seven feet, maybe a little more. And I was waiting for my passenger to come out from the liquor store and take them home to Newbridge.

***

Q: Prior to the contact did you see the other vehicle?

A: No, actually, I – as I said, I park in front of the liquor store and maybe a little bit south of it because – first of all, there was – there's no parking space in front of the stores, and I saw all parked cars, I didn't see any lights on or somebody backing up or the taillights. I wouldn't stop there if I would have seen something like that.

***

Q: The position of your vehicle, is it close to a curb then or close to parked cars or what do you mean by that?

A: Of course close to parked cars because I should have left space on my left side for other cars passing by.

Q: ...In other words...when you said you stopped the vehicle, were you talking about seven – under 10 feet away from parked cars to your left or to your right?

A: To my right.

***

Q: And what about to your left, are there any parked vehicles to your left?

A: No, it's a Plaza, it's an open space.

Q: Meaning on your left side there's parking also, correct, or no?

A: No. The parking spots on my left is in the middle of the Plaza which is far away from where the stores are.

***

Q: And where you stopped there were only vehicles parked to your right side, correct?

A: Yes.

Q: And the vehicle that made contact with you, do you recall what direction it came from?

A: It was facing west and backed up east.

Q: But in terms of your vehicle, did it come from your left or your right?

A: From my right.

***

(Kohlios Tr., pp. 23-29).

Defendant Robert A. Frank testified that prior to the accident he was at Mom's Cigar Lounge in the subject shopping center/plaza. He was parked in the parking lot. He testified that he parked his car in front of Mom's Cigar Lounge (Frank Tr., p. 10). It was dark out when he exited the lounge and he went to his car. He did not see any vehicle obstructing or in the driving lane. Before reversing his car, he looked in his mirrors and left and right and did not see anything. He did not recall what direction he was looking as he pulled out. Prior to the impact he did not see the other vehicle. The back of his car hit the other vehicle. The right back of the other car was hit.

In seeking summary judgment, defendants Yellow and Kohlios submit that as established by the deposition testimony of the parties, at the time of the accident at issue, the Yellow/Kohlios

vehicle was fully stopped in the parking lot waiting for a passenger (non-party) who had gone into a store. While the Yellow/Kohlios vehicle remained stopped, the co-defendant came from a store entered his own parked vehicle and reversed it coming into contact with the stopped Yellow/Kohlios vehicle. Defendants claim that they were not negligent nor otherwise at fault for the occurrence and that liability rests solely as against the co-defendant Robert A Frank in failing to see the Yellow/Kohlios vehicle either before he entered his vehicle or while reversing his vehicle.

In opposition, plaintiff argues that pursuant to the defendant Kohlios' own testimony, "he did not stop the car as he should of in a legal parking stop [sic] within the lot" and that therefore "he did not take the due and diligent steps to ensure he was not obstructing the passage of traffic within the lot while he was awaiting the return of his passenger" (Aff. In Opp., ¶7).

Defendant, Frank, in opposition, submits colored photographs of the shopping center and points out that the liquor store where defendants Yellow and Kohlios claim to have stopped and where the accident is claimed to have occurred is not near the cigar lounge where defendant, Frank, had parked his vehicle. Defendant contends that he walked five feet from the cigar lounge to his vehicle parked out in front of the lounge. Therefore, he argues, "[c]learly each driver's version of the events that day are quite different leaving a question of fact" (Aff. In Opp., ¶14).

Although the issue of proximate cause is generally one for the jury (*Derdiarian v. Felix Contr. Corp.*, 51 NY2d 308, 314–315 [1980]), "liability may not be imposed upon a party who 'merely furnished the condition or occasion for the occurrence of the event' but was not one of its causes" (*Shatz v. Kutshers Country Club*, 247 AD2d 375, 375 [2nd Dept. 1998], *quoting Sheehan v. City of New York*, supra at 503). This Court finds that, here, in support of their motion, Yellow and Kohlios have demonstrated their prima facie entitlement to judgment as a matter of law by

presenting evidence that their conduct in stopping the taxi cab while waiting for a passenger merely furnished the condition or occasion for the accident, and was not a proximate cause of the plaintiff's injuries (*see Wechter v. Kelner*, 40 AD3d 747, 748 [2nd Dept. 2007]).

In opposition, both the plaintiff and defendant Frank, have has failed to present an triable issue of fact.

Indeed, neither the plaintiff nor the defendant Frank offer any factual evidence or proof to support their respective claims. First, the plaintiff's claim that Kohlios "did not stop the car as he should of in a legal parking stop [sic] within the lot" and that "he did not take the due and diligent steps to ensure he was not obstructing the passage of traffic within the lot while he was awaiting the return of his passenger", is completely unfounded. On the contrary, the record supports the finding that Kohlios did take steps to ensure that traffic would not be obstructed in the parking lot. Similarly, defendant Frank's claim that Kohlios' testimony that he stopped his car directly in front of the liquor store is entirely baseless. As recounted above, Kohlios stated "I stopped my car with the engine running for – away from the parked cars, like six, seven feet, maybe a little more."

In any event, neither the plaintiff nor defendant Frank present any admissible evidence sufficient to raise a triable issue of fact as to proximate cause.

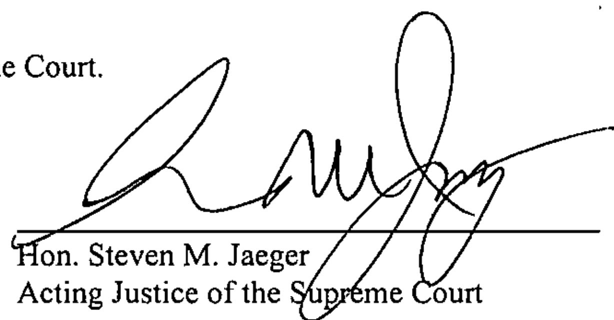
Accordingly, defendants' motion for summary judgment dismissal of the plaintiff's complaint on the issue of liability is granted.

The complaint is dismissed (only) as against defendants Yellow and Kohlios.

The parties' remaining contentions have been considered and do not warrant discussion.

Any applications not specifically addressed are denied.

This constitutes the decision and order of the Court.



Hon. Steven M. Jaeger
Acting Justice of the Supreme Court

Dated: November 1, 2018
Mineola, NY

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