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| <b>Turner v Bright</b>                                                                                                                                                                                                         |
| 2018 NY Slip Op 34223(U)                                                                                                                                                                                                       |
| October 22, 2018                                                                                                                                                                                                               |
| Supreme Court, Orange County                                                                                                                                                                                                   |
| Docket Number: Index No. EF004577-2017                                                                                                                                                                                         |
| Judge: Catherine M. Bartlett                                                                                                                                                                                                   |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
SHANIECE L. TURNER,

Plaintiff,

-against-

JOHN R. BRIGHT and MOBILE LIFE SUPPORT  
SERVICES, INC.,

Defendants.

To commence the statutory time  
period 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.

Index No. EF004577-2017  
Motion Date: August 10, 2018

-----X

The following papers numbered 1 to 9 were read on Defendants' motion for summary  
judgment based upon the alleged absence of a serious injury per Insurance Law §5102(d):

Notice of Motion - Affirmation / Exhibits - Physician Affirmations (2) - Memorandum . . . . 1-5

Affirmation in Opposition / Exhibits - Affidavit - Physician Affirmation . . . . . 6-8

Reply Affirmation . . . . . 9

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for personal injuries arising out of a motor vehicle accident. Defendants  
John R. Bright and Mobile Life Support Services, Inc. move for summary judgment, asserting  
that plaintiff Shaniece L. Turner did not sustain a "serious injury" as defined by Insurance Law  
§5102(d).

**The Accident**

On March 25, 2016, Ms. Turner was operating her Ford Focus on Prospect Avenue in Middletown, New York. As she proceeded through the intersection with East Main Street, her vehicle was struck in driver's side rear door by a Mobile life ambulance. She was wearing her seat and shoulder belt, and had her hands on the steering wheel. Upon impact, she was thrown forward and to the left, and struck her head on the roof of the vehicle. Immediately after the accident she experienced pain *inter alia* in her right shoulder. She had no prior injuries or complaints with respect to that shoulder.

**Plaintiff's Right Shoulder**

Ms. Turner complained of her right shoulder pain to ambulance personnel, to emergency room personnel at the Orange Regional Medical Center, and to orthopaedist Vincent Gulfo, M.D., whom she saw on March 31, 2016, within a week of the accident. Ms. Turner was deemed to be disabled and given a doctor's note to excuse her from work. She commenced physical therapy on her shoulder, but advised Dr. Gulfo that her shoulder pain was worse after therapy. Dr. Gulfo ordered an MRI of the right shoulder, which was taken on April 16, 2016 (prior to a May 2016 motor vehicle accident involving injury to her right knee and lower back). The radiologist found an irregularity involving the supraspinatus tendon which he interpreted as a "possible subtle tear." Dr. Gulfo concurred.

Ms. Turner returned to Dr. Gulfo for reassessment on May 10, 2016, June 28, 2016, August 9, 2016, September 13, 2016, November 2, 2016, and January 17, 2017. On each of these occasions, Ms. Turner complained of shoulder pain and was found upon objective testing to have a limited range of shoulder motion which interfered with the activities of daily living.

Meanwhile, Ms. Turner consulted with orthopaedic surgeon John P. Handago, M.D. on May 24, 2016. Dr. Handago found that her right shoulder range of motion was diminished with pain, and started her on a conservative regimen of medication and physical therapy. She returned to Dr. Handago on June 21, 2016, August 15, 2016, September 26, 2016, November 7, 2016, December 19, 2016, January 17, 2017, February 14, 2017, and March 16, 2017. Dr. Handago continued to find that her right shoulder range of motion was diminished and painful. On April 20, 2017, Ms. Turner complained that her right shoulder pain was increasing and making it more difficult to perform her activities of daily living. Dr. Handago recommended arthroscopy.

On June 10, 2017, Dr. Handago performed an arthroscopy of Ms. Turner's right shoulder. His operative report states a diagnosis of *inter alia* rotator cuff tendon tear of the right shoulder.

After her right shoulder surgery, Ms. Turner returned to Dr. Gulfo for reassessment on August 24, 2017, October 5, 2017, January 18, 2018 and April 17, 2018. As of April 2018, Ms. Turner was still found upon objective testing to have a limited range of shoulder motion which interfered with the activities of daily living. Dr. Gulfo concluded that as a result of the March 25, 2016 motor vehicle accident, Ms. Turner had sustained internal derangement of the right shoulder, and continued despite arthroscopic surgery to experience pain and to suffer from a 40% reduction in the functional use of the right shoulder.

#### **Dr. Hendler's Report**

Defendants move for summary judgment on "serious injury" threshold grounds based on the February 7, 2018 independent medical examination ("IME") of Ms. Turner by orthopaedist Robert C. Hendler, M.D. So far as is relevant to the issue of her right shoulder, Dr. Hendler's report states:

...On 6/10/17 Dr. Handago performed an operative arthroscopy of the right shoulder. I have reviewed the operative report. I do not feel that there was any post-traumatic pathology seen at the time of this surgical procedure. I would like to evaluate the color intraoperative photographs of this surgical procedure if they can be made available for my review...

.....

Examination was performed of both shoulders. There were three, small, arthroscopic surgical scars present on the right shoulder. Range of motion testing was determined by visual measurement. The following tests were used to determine range of motion. There was full range of motion of both shoulders both actively and passively....However, she complained of pain at the extremes of motion of her right shoulder. There was no atrophy of either shoulder girdle musculature. There were no palpable trigger zones or crepitus on range of motion of either shoulder. Hawkins, Neer and O'Brien's tests were negative bilaterally.

.....

With regard to her right shoulder, there was no mechanism of injury to cause a rotator cuff tear at the time of the accident of record. She has had an MRI study, which apparently did not show any rotator cuff tear. Dr. Handago described a weakened area of the tendon, for which he passed a probe through at the time of his operative arthroscopy, and performed a rotator cuff repair....It is my opinion, with a reasonable degree of medical certainty, that the need for the surgical procedure on the right shoulder performed by Dr. Handago is not at all causally related to the accident of record. Again, I would like to review the intraoperative color photographs taken at the time of Dr. Handago's right shoulder surgery.

Physical examination of her right shoulder at this time is essentially normal. There is no present disability, and she will have no permanent findings in her right shoulder that would be causally related to the accident of record.

### **"Serious Injury"**

The No-Fault Law precludes recovery by Plaintiff from Defendant for pain and suffering and other non-monetary detriment unless Plaintiff sustained a "serious injury" causally related to the motor vehicle accident at issue. Insurance Law §5104(a). "Serious injury" is, among other things, "a personal injury which results in ... permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system...." Insurance Law §5102(d). Serious injury must be demonstrated by objective medical evidence. *Pommells v.*

*Perez*, 4 NY3d 566 (2005); *Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 (2002).

Where as here the plaintiff claims serious injury arising from a “permanent consequential limitation of use” or “significant limitation of use”, the determination whether the limitation is “significant” or “consequential” relates to medical significance, and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *Id.* Thus, to establish a claim under either of these categories, the plaintiff must submit medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing the plaintiff’s present limitation to the normal function, purpose and use of the affected body organ, member, function or system. *Perl v. Meher*, 18 NY3d 208 (2011); *Toure v. Avis Rent A Car Systems, Inc.*, *supra*.

#### **Summary Judgment Standard**

While Plaintiff ultimately bears the burden of proof of serious injury, Defendant, as the proponent of a summary judgment motion, “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). The movant’s failure to meet this burden of proof “requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Id.* . If the movant establishes *prima facie* entitlement to summary judgment, the opponent, to defeat the motion, “must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Here, then Defendants were required to establish through evidence in admissible form that Plaintiff’s injuries were not “serious” within the meaning of Insurance Law §5102(d). *See*,

*Baez v. Rahamatali*, 6 NY3d 868 (2006); *Perez v. Ali*, 23 AD3d 363 (2d Dept. 2005); *Dillon v. Thomas*, 266 AD2d 183 (2d Dept. 1999).

There are three essential issues: (1) Is there objective medical evidence of injury ? (2) Is the injury causally related to the motor vehicle accident ? (3) Has the injury resulted in a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system ?

**A. Objective Medical Evidence Of Injury**

The existence of a rotator cuff tendon tear may constitute serious injury provided there is objective evidence of the extent and duration of physical limitations resulting from the injury. *See, Resek v. Morreale*, 74 AD3d 1043, 1045 (2d Dept. 2010); *Silla v. Mohammad*, 52 AD3d 681, 683 (2d Dept. 2008); *Djetoumani v. Transit, Inc.*, 50 AD3d 944, 945 (2d Dept. 2008); *Balanta v. Stanlaine Taxi Corp.*, 307 AD2d 1017, 1018 (2d Dept. 2003). In range of motion cases, the defendant's medical expert must set forth the objective tests performed during the examination that led him to conclude that the plaintiff did not suffer a serious physical injury. *See, Kennedy v. Brown*, 23 AD3d 625 (2d Dept. 2005); *Black v. Robinson*, 305 AD2d 438 (2d Dept. 2003); *Gamberg v. Romeo*, 289 AD2d 525 (2d Dept. 2001).

Dr. Handago's operative report, together with the April 16, 2016 MRI report, evidence a tear of the right shoulder rotator cuff supraspinatus tendon. Dr. Hendler's doubts on this score were twice qualified by his expressed need to review Dr. Handago's intraoperative photographs, which evidently did not occur. Furthermore, Dr. Hendler's opinion that Plaintiff's right shoulder was essentially normal was predicated on "range of motion testing...determined by visual measurement." There is no indication whatsoever that the said "visual measurement" of

Plaintiff's range of motion constituted objective testing. For both of these reasons, Defendants failed to demonstrate *prima facie* that there was no objective medical evidence of injury.

Conversely, the MRI report, the operative report, and Dr. Gulfo's findings upon objective testing of significant limitations in range of shoulder motion over a substantial period of time constitute objective medical evidence of serious injury.

**B. Causation**

To demonstrate *prima facie* entitlement to summary judgment on the issue of causation, the defendant is required to demonstrate by evidentiary proof in admissible form that the plaintiff's injury was not causally related to the accident. *See, e.g., Rodgers v. Duffy*, 95 AD3d 864, 866 (2d Dept. 2012); *Catania v. Hussain*, 78 AD3d 639 (2d Dept. 2010); *McKenzie v. Redl*, 47 AD3d 775, 776-777 (2d Dept. 2008). Medical opinion that is speculative or conclusory is insufficient to establish *prima facie* a lack of causation. *See, Pupko v Hassan*, 149 AD3d 988, 989 (2d Dept. 2017); *Rivera v. Ramos*, 132 AD3d 655 (2d Dept. 2015); *Hines v. Swift Transportation Co., Inc.*, 291 AD2d 480 (2d Dept. 2002). Absent sufficient proof, the burden does not shift to the plaintiff to demonstrate the existence of a triable issue of fact on causation. *See, Senior v. Mikhailov*, 71 AD3d 864, 865 (2d Dept. 2010); *Madatova v. Madatov*, 27 AD3d 531 (2d Dept. 2006).

The evidence here shows that Plaintiff had no pre-existing right shoulder injury or pain; that she was involved in a serious motor vehicle accident the impact of which immediately caused her to experience right shoulder pain; that she promptly complained of right shoulder pain to ambulance personnel, to hospital emergency room personnel, and to Dr. Gulfo; and that an MRI taken within three weeks of the accident revealed a possible rotator cuff tendon tear, which



tear – after an extensive course of physical therapy and pain management – was evidently confirmed upon arthroscopic surgery.

In the face of this evidence, Dr. Hendler stated in entirely conclusory fashion that “there was no mechanism of injury to cause a rotator cuff tear at the time of the accident of record,” providing no explanation whatsoever. Moreover, his stated opinions on causation – that he “do[es] not feel” that there was any post-traumatic pathology seen at the time of Plaintiff’s surgical procedure, and that the surgery was not causally related to the accident – were, as noted above, expressly qualified by his need to review Dr. Handago’s intraoperative photographs, which evidently did not occur. In view of the foregoing, Dr. Hendler’s opinions on causation were hopelessly speculative and conclusory, and thus insufficient to establish *prima facie* a lack of causation. Conversely, Dr. Gulfo’s opinion that Plaintiff’s shoulder injury was causally related to the March 25, 2016 is supported by evidence in the record and is sufficient to demonstrate the existence of a triable issue of fact on causation.

### **C. Significant Limitation / Permanent Consequential Limitation**

Defendants having failed to demonstrate that Dr. Hendler’s opinion that Plaintiff did not sustain a significant limitation of use, or permanent consequential limitation of use, of her right shoulder was based on objective range of motion testing (*see*, Point “A” above), they have failed to demonstrate *prima facie* entitlement to summary judgment. Conversely, Dr. Gulfo’s findings based upon objective testing that Plaintiff had substantial limitations in range of motion and right shoulder function over a substantial period of time, both pre- and post-arthroscopic surgery, demonstrates the existence of triable issues of fact whether Plaintiff’s limitations were significant, consequential and permanent.

**Conclusion**

In view of the foregoing, the Court holds that Defendants failed to establish *prima facie* entitlement to summary judgment on the issue whether Plaintiff sustained a “serious injury” to her right shoulder as a result of the March 25, 2016 automobile accident, and further, that Plaintiff’s evidence demonstrates the existence of triable issues of fact on that score. Since a showing of any “serious injury” entitles the Plaintiff to recover for all injuries sustained as a result of the accident (*see, Rubin v. SMS Taxi Corp.*, 71 AD3d 548, 549 [1<sup>st</sup> Dept. 2010]; *Marte v. NYCTA*, 59 AD3d 398, 399 [2d Dept. 2009]), the Court declines to address the remaining issues raised on Defendants’ motion.

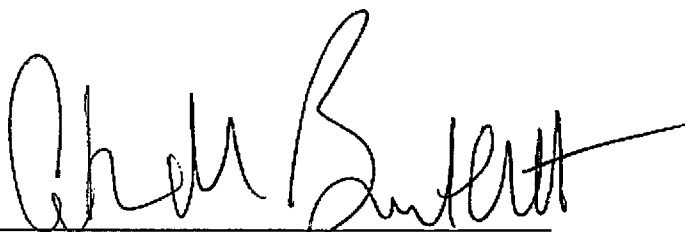
It is therefore

ORDERED, that Defendants’ motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: October 22, 2018  
Goshen, New York

ENTER

  
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HON. CATHERINE M. BARTLETT, A.J.S.C.  
HON. C. M. BARTLETT  
JUDGE NY STATE COURT OF CLAIMS  
ACTING SUPREME COURT JUSTICE