

Haniff v Dongchu
2019 NY Slip Op 32274(U)
June 24, 2019
Supreme Court, Bronx County
Docket Number: 301132/2016
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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SABRINA HANIFF and ANTHONY ROOPNARINE,
Plaintiff,

Index No.: 301132/2016

-against-
TASHI DONGCHU and OBESIA PHILLIPS,
Defendants.

-----X
HON. MARY ANN BRIGANTTI:

These two Motions are decided in this same Order:

(1) Motion by Defendant, OBESIA PHILLIPS, seeking summary judgment in his favor on his liability to Plaintiffs; and

(2) Motion by Defendant, TASHI DONGCHU, seeking summary judgment on the issue of whether Plaintiffs sustained serious injuries within the meaning of the Insurance Law.

Plaintiffs commenced this action against Defendants to recover for alleged personal injuries sustained in a three-vehicle motor vehicle accident, which occurred on August 16, 2015, at about 8:20 p.m., on the Van Wyck Expressway Service Road, near Liberty Avenue, in Queens, NY.

The Plaintiff, SABRINA HANIFF, was the driver of the front-most vehicle, in which her son, Plaintiff ANTHONY ROOPNARINE was a front-seat passenger. Defendant OBESIA PHILLIPS was the driver of the middle car in which Norman Fraser was a passenger. Defendant TASHI DONGCHU was the

rear-most driver.

By “Order of Joint Trial”, this Court had directed that the above-entitled action be jointly tried with two other actions arising out of the same motor vehicle accident, namely: *Phillips v. Dongchu*, Bronx Index No. 25128/2015, and *Fraser v. Dongchu and Phillips*, Bronx Index No. 304880/2015.¹

Differing versions of this multi-car accident are presented in the parties four Affidavits, which are summarized *infra*.

Plaintiff SABRINA HANIFF’s Version of the Accident:

Plaintiff SABRINA HANIFF alleges that she was operating her Nissan vehicle on the service road of the Van Wyck Expressway, on August 16, 2015. Her son, Plaintiff ANTHONY ROOPNARINE was sitting in the front passenger seat. She brought her vehicle to a stop at a red traffic light at the intersection of Liberty Avenue. While she was stopped at the traffic light, she was struck in the rear by PHILLIPS’ vehicle.

A few seconds after the initial impact, she felt a second, heavy, impact, when DONGSHU’s vehicle struck PHILLIPS’ vehicle. This caused PHILLIPS’ vehicle to be pushed into the rear of her vehicle. Thus, according to HANIFF, there were two (2) impacts to the rear of her vehicle. (See Plaintiff HANIFF’s

¹ The “Order of Joint Trial”, made it the matter of *Phillips v. Dongchu*, Bronx Index No. 25128/2015, is dated October 10, 2017.

Affidavit dated November 28, 2018).

Plaintiff HANIFF had similarly testified at her deposition that her vehicle was struck twice in the rear. (HANIFF's EBT, p. 35- 36, 49-50).

Plaintiff ANTHONY ROOPNARINE's Version of the Accident:

Plaintiff ANTHONY ROOPNARINE alleges that, on the date of the accident, he was a front passenger in the vehicle of HANIFF, his mother. While they were stopped at the traffic light, their vehicle was struck in the rear by PHILLIPS' vehicle.

Similar to his mother, he asserts that he felt a second impact after DONGCHU's vehicle struck PHILLIPS' vehicle and pushed it into the rear of their vehicle. (See Plaintiff ROOPNARINE's Affidavit dated November 28, 2018).

Consistent therewith, ROOPNARINE had testified at his deposition that he had felt, and heard, two (2) impacts to the rear of their vehicle. (ROOPNARINE EBT, p. 23-28).

Defendant OBESIA PHILLIPS' Version of the Accident:

Defendant PHILLIPS alleges that, on August 16, 2015, he was traveling on the Van Wyck Expressway service road. At its intersection with Liberty Avenue, the traffic light was red, and he came to a complete stop, about one to two feet behind HANIFF's vehicle, which was stopped at the light.

According to PHILLIPS, he was stopped for at least two minutes when his

vehicle was struck in the rear by the vehicle driven by Defendant DONGCHU.

This caused his vehicle to move forward and strike HANIFF's vehicle in front of him. (See Defendant PHILLIP's Affidavit, dated Feb. 22, 2018).

Defendant TASHI DONGCHU's Version of the Accident:

On August 16, 2015, DONGCHU, an Uber driver, was driving northbound on the Van Wyck Expressway Service Road, which is a one-way roadway for northbound traffic, and has three lanes of moving traffic. There is a traffic light where it intersects with Liberty Avenue, which is a two-way street for eastbound and westbound traffic, and there are 2 lanes of traffic in each direction.

DONGCHU had four passengers in his vehicle. At the time, traffic was very heavy, and only moving at about 10 m.p.h. He was traveling in the middle lane, more than 7 or 8 car lengths from the traffic light, and about ten feet from the car in front of him.

In relevant part, DONGCHU states as follows: "From the distance where I was from the traffic light/intersection, I could not see the light. Suddenly the car in front of me stopped very quickly and I immediately stepped on my brakes but I tapped the car in front of me." DONGCHU was not injured, and neither were his passengers. There was no damage to his vehicle, and no damage to the vehicle in front of his. He did see damage to the front-most vehicle, by the lower rear door and there was a dent on that door.

The NYPD arrived at the scene, and DONGCHU told the police officer what happened

DONGCHU saw that the front-most vehicle's driver and passenger, and the driver of the vehicle in front of his, were taken away by ambulance. (*See* DONGCHU's Affidavit, dated July 6, 2017). In the Police Report, it is noted that both occupants of PHILLIPS' vehicle, and both occupants of HANIFF's vehicle, were transported to Jamaica Hospital.

(1) Motion by Defendant OBESIA PHILLIPS:

Defendant PHILLIPS' motion for summary judgment in her favor on the issue of her liability to Plaintiffs, is denied.

Vehicle and Traffic Law § 1129(a) "Following too closely", provides that: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." It is well-established that "drivers are required to maintain a reasonably safe rate of speed, maintain control over the vehicle, and use reasonable care to avoid a collision, by, among other things, including maintaining a safe distance" (*Passos v MTA Bus Co.*, 129 AD3d 481, 481-482 [1st Dept 2015], citing Vehicle and Traffic Law § 1129 [a]). "Under the law applicable to rear end collisions, a presumption of negligence is established by proof that a stopped car was struck in the rear. However, that

presumption can be rebutted if the operator of the rear vehicle comes forward with an adequate non-negligent explanation for the accident” (*id.* [internal quotation marks omitted]). “A grant of partial summary judgment against a defendant on liability in a negligence case is the equivalent of finding that the defendant owed the plaintiff a duty of care, the defendant breached that duty by its negligence, and such breach proximately caused the plaintiff injury.” [emphasis added] (*Oluwatayo v Dulinayan*, 142 AD3d 113, 118 [1st Dept 2016]).

In the instant three-car collision, four affidavits are submitted, containing different versions of the events.

Defendant PHILLIPS seeks to rebut the presumption of negligence on his part, by asserting that he was merely pushed, once, into Plaintiffs’ vehicle after being rear-ended by DONGCHU. However, Plaintiffs allege that they were hit twice in the rear.

“[I]n a multiple-vehicle accident, where, as here, there is a question of fact as to the sequence of the collisions, it cannot be said as a matter of law that the negligence of the operator of the last vehicle in the line of vehicles was a proximate cause of the injuries to an occupant of the lead vehicle.” (*See Vavoulis v Adler*, 43 AD3d 1154, 1156 [2d Dept 2007]; *see also Passos*, 129 A.D.3d at 482).

The facts in *Vavoulis* were similar to those in the case at bar, in that plaintiff *Vavoulis*, the front-most vehicle in a three-car accident, was stopped at a red light

when he felt two separate impacts.

Thus, therein, the record contained evidence from which a jury could find that the middle car was negligent, in addition to the rear-most car. “If that finding is made, the jury would then have to determine whether both acts of negligence were concurrent proximate causes of the plaintiff’s injuries, or only one or the other was the proximate cause.” (*Vavoulis v Adler*, 43 AD3d 1154, 1156 [2d Dept 2007]).

The *Passos* case, also, arose out of a three-vehicle collision, where the front driver “testified that he was at a complete stop at a red light, and that he was hit twice in the rear”. That testimony raised an issue of fact as to whether the middle car hit the front car prior to being rear-ended, according to the Court, which held that summary judgment was properly denied, since: “it cannot be said as a matter of law there was only one proximate cause of plaintiffs’ injuries.” (*Passos v MTA Bus Co.*, 129 AD3d 481, 482 [1st Dept 2015]).

Likewise, in the instant matter, PHILLIPS’ motion for summary judgment is denied, since it will be up to the jury to determine whether PHILLIPS was negligent in addition to DONGCHU, and if so, whether PHILLIPS’ negligence was a proximate cause of Plaintiffs’ injuries.

(2) Motion by Defendant TASHI DONGCHU on “serious injury”:

Defendant DONGCHU moves for summary judgment upon the ground that Plaintiffs did not sustain a “serious injury” within the meaning of the Insurance Law.

Pursuant to Insurance Law §5102(d), a “serious injury” is defined, in relevant part, as follows:

“ ‘Serious injury’ means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

On a defendant’s motion for summary judgment, defendant bears the “initial burden to establish a prima facie case that plaintiff’s alleged injuries did not meet the serious injury threshold under the No-Fault Law”. (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]). If defendant establishes “prima facie entitlement to summary judgment, the burden [then] shift[s] to plaintiff to offer proof in admissible form sufficient to create a material issue of fact necessitating a trial.” (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]).

--Plaintiff SABRINA HANIFF

Plaintiff SABRINA HANIFF alleges that she suffered the following injuries: As to her left shoulder: tendon tears, and SLAP (Superior Labrum

Anterior to Posterior) tear of the labrum – for which she underwent surgery; as to her left knee: tears of the lateral meniscus, the anterior cruciate ligament, and medial meniscus; and, as to her left hip: a tear of the labrum. She also alleges that she suffered herniated discs in her neck and back. (*See* HANIFF’s Affidavit, dated March 4, 2019).

In support of his Motion, as it pertains to Plaintiff HANIFF, the Defendant submits the affirmed reports of Dr. Shanker Krishnamurthy, an orthopedist; Dr. John H. Buckner, an orthopedist; Dr. Nicholas D. Caputo, a trauma expert; Dr. A. Robert Tantleff, a radiologist; and Dr. Michael J. Carciente, a neurologist.

Dr. Shanker Krishnamurthy, an Orthopedist, performed an examination on the Plaintiff HANIFF on July 18, 2018. He reviewed medical records by Plaintiff’s treating doctors as well as those prepared by Defendant’s experts. He concluded, in relevant part, that, he could not give an opinion regarding the presence, or absence, of an acute injury, with respect to Plaintiff’s left knee, and left shoulder, since he, himself, had not reviewed the MRI studies dated October 24, 2015. He cites significant discrepancies in the radiology reports of Dr. Lichy and Dr. Tantleff.

With respect to Plaintiff HANIFF’s cervical and lumbar spines, Dr. Krishnamurthy noted “neurologically there was poor motor effort in all muscle groups”. His “diagnosis” included that Plaintiff suffered pain in the left shoulder,

left hip, left wrist, left knee, left ankle, and low back, and cervicalgia. (*See* Dr. Krishnamurthy's affirmed report dated July 18, 2018).

Dr. John H. Buckner, an orthopedist, performed an analysis of Plaintiff HANIFF's medical records, including the Jamaica Hospital Emergency Room Records and the MRI Reports from Precision Imaging of New York by Dr. Jacob Lichy and Dr. Thomas Kolb, and Operative Report by Dr. Ehrlich on the left shoulder surgery. Dr. Buckner opines that, on the Clinical, Radiological, and Operative levels, plaintiff's presentation revealed chronic degeneration unrelated to the subject accident. He believes that the Plaintiff's alleged injuries were not caused by the one-time acute traumatic event. (*See* Dr. Bruckner's affirmed report, dated November 15, 2018).

Dr. Nicholas D. Caputo, a trauma expert, analyzed the Plaintiff HANIFF's Jamaica Hospital Medical Center's Emergency Room treatment records. Therein, he found "no evidence to support any acute cervical, thoracic, or lumbar spine injury"-- except the finding, upon examination of Plaintiff's neck, that there was "left paracervical tenderness". Also, in the Jamaica Hospital ER records, he saw no abnormal findings "to support any significant acute left shoulder/wrist or left hip/knee/ankle injury".

Therefore, it was his opinion "that there were no acute traumatic findings to casually relate the subject accident on 8/16/2015 and the claimed injuries." (*See*

Dr. Caputo's affirmed report dated 8/23/2017).

Dr. A. Robert Tantleff, a radiologist, reviewed, on June 8, 2017, on behalf of Defendant, the MRIs of Plaintiff HANIFF's left shoulder (dated October 24, 2015), left knee (dated October 24, 2015), and left hip (dated October 25, 2015).

As far as the Plaintiff HANIFF's left shoulder, Dr. Tantleff's "Impression" was:

"chronic wear and tear and overuse changes not inconsistent with the individual's age, exacerbated by the patient's body habitus, manifested by osteoarthritic changes of the acromioclavicular joint, type III keel acromion which is a comorbidity for degeneration of the shoulder, especially the supraspinatus and infraspinatus tendon, and anterior anterosuperior glenoid labrum. Consistent with the foregoing is significant tendinosis of the supraspinatus and infraspinatus tendon and possible degenerative interstitial tearing thereof as detailed. There is a degenerative grade I SLAP lesion as a result involving the anterior anterosuperior glenoid labrum, degeneration of the biceps labral complex, and tendinosis of the long head of the biceps tendon. There are no markers of acute or recent injury. The findings represent chronic wear and tear and overuse changes consistent with the individual's age, unrelated to a single date of incident, and without correlation to the current date of incident."

(See Dr. Tantleff's affirmed report dated June 8, 2017).

As far as the Plaintiff HANIFF's left knee, Dr. Tantleff's "Impression" was:

"chronic wear and tear and overuse changes exacerbated by the patient's body habitus, resulting in lateral displacement and tilting of the patella, chondromalacia patella, trochlear cartilage degeneration, tendinosis of the quadriceps patellar tendon, tendinosis/degeneration of the anterior cruciate ligament with chronic atrophy, fibrillation and fraying, and a degenerative laxity, and probable degenerative interstitial tearing. There are no markers of acute or recent injury or traumatic tear or rupture of the regional ligaments, tendons or menisci. There is degeneration of the medial and lateral menisci... There are no findings related to a single date of incident or the current date of incident".

(See Dr. Tantleff's affirmed report dated June 8, 2017).

As far as the Plaintiff HANIFF's left hip, Dr. Tantleff's "Impression" was:

"Bilateral osteoarthritic changes of the hips. There is degeneration of the acetabular labrum, best demonstrated in the left hip, consistent with left hip examination. There is no evidence of traumatic tears or rupture of the acetabular labrum, regional ligaments or tendons. The femoral head and neck are maintained. There are no markers of acute or recent injury. The examination was performed approximately 2½ months following the date of the incident and does not reveal evidence of recent trauma. The regional soft tissues are maintained. There are no findings related to a single date of incident or the current date of incident."

(See Dr. Tantleff's affirmed report dated June 8, 2017).

Dr. Michael J. Carciente, a neurologist, examined the Plaintiff HANIFF on July 25, 2018. Dr. Carciente's "Impressions" were that the neurologic examination was within normal limits. Specifically, he found no myotomal weakness, dermatomal sensory deficits, asymmetric reflexes, or atrophy supporting the presence of a radiculopathy. There was no spasticity, ankle clonus, extensor plantar responses, or sensory levels supporting the presence of a spinal cord condition, and there was no correlation between the findings allegedly found in the spine MRI reports and the exam. He found no evidence of an ongoing neurological injury, disability or permanency. (See Dr. Carciente's affirmed report, dated July 26, 2018).

In opposition to Defendants' Motion, Plaintiff HANIFF submits the affirmed reports of Dr. Randall V. Ehrlich, Plaintiff's treating orthopedic surgeon, and Dr. Siddharth Prakash, a radiologist.

Dr. Ehrlich reviewed Plaintiff HANIFF's pertinent medical records, including the Plaintiff's MRIs of the left shoulder, left knee, and left hip, taken at Precision Imaging of New York, and the Jamaica Hospital records.

Dr. Ehrlich first examined Plaintiff HANIFF on November 19, 2015, and, based upon his thorough examination as detailed in his report, and his review of medical records and objective tests including the MRIs, and, based upon his experience, he determined that it was medically necessary to perform surgery on Plaintiff's left shoulder on December 8, 2015. (*See* Dr. Ehrlich's affirmed report, dated February 13, 2019).

With respect to Plaintiff's left shoulder, Dr. Prakash, a radiologist, examined the MRI performed at Precision Imaging of New York, on October 24, 2015, and found that Plaintiff HANIFF sustained the following injuries: a distal bursal tear of the supraspinatus tendon, a partial thickness tear of the infraspinatus tendon, a bucket-handle tear of the anterior inferior labrum, a superior anterior labral tear, and a SLAP tear. (*See* Dr. Prakash Affirmation, dated March 4, 2019).

The arthroscopic left shoulder surgery, performed by Dr. Ehrlich, consisted of an arthroscopic subacromial decompression, distal clavicle resection, anterior capsular lysis of adhesions and glenohumeral debridement. His findings during surgery included an anterior labral tear with an unstable flap component and anterior capsular post-traumatic contracture with a partial tear of the supraspinatus

tendon.

Dr. Ehrlich concluded that Plaintiff incurred significant, and permanent, injuries to her left shoulder as a result of the subject accident, and that Plaintiff required the aforesaid surgery, for the left shoulder traumatic intra-articular, and subacromial, damage. In addition, Plaintiff required multiple months of formal supervised physical therapy pre-operatively, and post-operatively. HANIFF's most recent physical examination, of her left shoulder, revealed that she still suffered from decreased active and passive range of motion, as well as tenderness, muscle spasm, and weakness, as detailed in Dr. Ehrlich's report.

Dr. Ehrlich also concluded that Plaintiff HANIFF incurred significant, and permanent, injuries to her left knee, and left hip, for which surgery is indicated.

Dr. Ehrlich opines that the subject motor vehicle accident was the competent-producing cause of the aforesaid traumatic injuries, based upon the objective findings, and the Plaintiff's history.

As far as the Plaintiff's left knee, Dr. Prakash examined the MRI performed at Precision Imaging of New York, on October 24, 2015, and found that Plaintiff HANIFF sustained the following injuries: a tear of the anterior horn of the lateral meniscus, a tear of the superior attachment of the anterior cruciate ligament, a tear of the posterior horn of the medial meniscus, and joint effusion. (*See* Dr. Prakash Affirmation, dated March 4, 2019).

As far as Plaintiff's left hip, Dr. Thomas Kolb, a radiologist at Precision Imaging of New York, found "a tear of the inferior femoro-acetabular labrum with associated joint effusion." (See Dr. Kolb's MRI Report, dated October 28, 2019).

Accordingly, Plaintiff HANIFF's doctors came to conclusions that were different from those of Defendant's experts. Thus, summary judgment is denied, since the conflicting doctors' reports raise issues of fact as to the "serious injury" categories of permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system.

In another matter where, as here, a plaintiff similarly underwent arthroscopic surgery to the shoulder, the Court found triable issues of fact, based upon the MRI report as well as the observations of plaintiff's orthopedic surgeon, stating as follows:

"On this record, triable issues of fact exist. A report of an MRI conducted of plaintiff's left shoulder on December 15, 2008, only five weeks after the accident, revealed a partial high-grade tear of the supraspinatus musculotendinous junction and a partial intrasubstance tear of the attachment of the infraspinatus tendon, which the radiologist opined were "post-traumatic with [a] high-degree [sic] of certainty." Plaintiff's orthopedic surgeon, who performed arthroscopic surgery on him on January 27, 2009, observed the relevant musculature with his own eyes, and opined that plaintiff suffered from a torn rotator cuff and impingement causally related to the accident. Although "[a] factfinder could of course reject this opinion" (see *Perl v Meher*, 18 NY3d 208, 219, 960 NE2d 424, 936 NYS2d 655 [2011]), it cannot be said on this record, as a matter of law, that plaintiff's injuries had no causal connection to the accident." (*Calcano v Rodriguez*, 103 AD3d 490, 490-491 [1st Dept 2013]).

Likewise, Plaintiff HANIFF's evidence raises genuine issues of fact,

especially in light of the MRI results and the observations of Plaintiff's orthopedic surgeon during surgery.

– Plaintiff ANTHONY ROOPNARINE

Plaintiff ANTHONY ROOPNARINE alleges that he suffered the following injuries: as to his right knee, fracture of the tibial plateau – for which he underwent surgery; and, as to his left shoulder, a torn labrum. He also alleges that he suffered herniated discs to his neck and back. (*See* ROOPNARINE's Affidavit, dated March 4, 2019).

In support of his Motion, as it pertains to Plaintiff ROOPNARINE, the Defendant submits the affirmed reports of Dr. Shanker Krishnamurthy, an orthopedist; Dr. John H. Buckner, an orthopedist; Dr. Nicholas D. Caputo, a trauma expert; Dr. A. Robert Tantleff, a radiologist; and Dr. Michael J. Carciente, a neurologist.

Dr. Shanker Krishnamurthy, an Orthopedist, performed an examination on the Plaintiff ROOPNARINE on July 18, 2018. He reviewed medical records by Plaintiff's treating doctors as well as those prepared by Defendant's experts.

With respect to Plaintiff ROOPNARINE's right knee, he acknowledged that, in reading the Nov. 7, 2015 MRI of the right knee, radiologist Dr. Chess' impression was "focal fracture lateral tibial plateau", but, that Dr. Tantleff did not find fractures.

Dr. Krishnamurthy also acknowledged that, in reading the Nov. 7, 2015 MRI of the left shoulder, radiologist Dr. Chess' impression was "partial tear posterior glenoid labrum", while Dr. Tantleff merely found "mild osteoarthritis of the acromioclavicular joint".

Reviewing those reports, in conjunction with the ER report, Dr. Krishnamurthy opined that ROOPNARINE "did not sustain any significant injuries to his right knee or to his left shoulder".

With respect to Plaintiff ROOPNARINE's lumbar, and cervical spines, Dr. Krishnamurthy could not give an opinion regarding the presence, or absence, of an acute injury, citing "significant discrepancy between the findings of Dr. Tantleff and Dr. Lichy". (See Dr. Krishnamurthy's affirmed report, dated July 18, 2018).

Dr. John H. Buckner, an orthopedist, performed an analysis of Plaintiff ROOPNARINE's medical records, including the Jamaica Hospital Emergency Room Records and the MRI Reports from Precision Imaging of New York by Dr. Jacob Lichy and Dr. Jeffrey Chess, and the Operative report by Dr. Ehrlich on the right knee surgery. Dr. Buckner opines that, based upon the clinical, radiological, and operative findings, Plaintiff's presentation revealed degeneration, and that the alleged injuries were not caused by the one-time acute traumatic event of the subject accident. (See Dr. Bruckner's affirmed report, dated November 15, 2018).

Dr. Nicholas D. Caputo, a trauma expert, analyzed the Plaintiff

ROOPNARINE's Jamaica Hospital Medical Center's Emergency Department records. Therein, he found "no evidence to support any acute cervical or lumbar spine injury ... there was no evidence to support any significant acute left shoulder or right knee injury".

Therefore, it was his opinion "that there were no acute traumatic findings to casually relate the subject accident on 8/16/2015 and the claimed injuries." (*See* Dr. Caputo's affirmed report dated August 23, 2017).

Dr. A. Robert Tantleff, a radiologist, reviewed, on June 5, 2017, on behalf of Defendant, the MRIs of Plaintiff ROOPNARINE's right knee (dated Nov. 7, 2015); left shoulder (dated Nov. 7, 2015); cervical spine (dated Nov. 28, 2015); and lumbar spine (dated Nov. 28, 2015). (*See* Dr. Tantleff's Affirmed Reports dated June 5, 2017).

As far as the Plaintiff ROOPNARINE's right knee, Dr. Tantleff's "Impression" was:

"There is no evidence of traumatic tears or ruptures of the regional ligaments, tendons or menisci. There is no evidence of fracture. There is a bony erosion. There are fibrocystic erosive changes at the insertion site of the posterior cruciate ligament at the tibial plateau, as described. There is chondromalacia patella, patellar tendon, quadriceps tendon and anterior cruciate ligament tendinosis. There is myxoid degeneration/Grade I degeneration of the anterior horn of the lateral meniscus with a parameniscal cyst, raising the probability of a degenerative cleavage tear."

As far as the Plaintiff ROOPNARINE's left shoulder, Dr. Tantleff's "Impression" was: that there was no evidence of rotator cuff pathology or

abnormality of the glenoid labrum, and no evidence of acute or recent injury. Dr. Tantleff found mild osteoarthritic changes of the acromioclavicular joint.

As far as the Plaintiff ROOPNARINE's cervical spine, Dr. Tantleff's "Impression" was: that Plaintiff's "multilevel degenerative discogenic changes are inconsistent with recent traumatic injury".

As far as the Plaintiff ROOPNARINE's lumbar spine, Dr. Tantleff's "Impression" was: that the "potential non-disc related causes of pain" are "degenerative disc disease, congenital transitional lumbosacral junction".

Dr. Michael J. Carciente, a neurologist, examined the Plaintiff ROOPNARINE on June 20, 2018. Dr. Carciente's "Impression" was that his "examination does not support the presence of an ongoing neurological injury, disability, or permanency." (*See* Dr. Carciente's affirmed report, dated June 24, 2018).

In opposition to Defendants' Motion, Plaintiff ROOPNARINE submits the affirmed reports of Dr. Randall V. Ehrlich, Plaintiff's treating orthopedic surgeon, and Dr. Siddharth Prakash, a radiologist.

Dr. Ehrlich reviewed Plaintiff ROOPNARINE's pertinent medical records, including the Plaintiff's MRIs of the left shoulder, and right knee, taken at Precision Imaging of New York, and the Jamaica Hospital records.

Dr. Ehrlich first examined Plaintiff ROOPNARINE on January 21, 2016;

and, based upon his findings as detailed in his report, and his review of medical records and objective tests including the MRIs, Plaintiff underwent surgery to his right knee on April 26, 2016. (*See* Dr. Ehrlich's affirmed report, dated February 13, 2019).

With respect to Plaintiff's right knee, Dr. Prakash, a radiologist, examined the MRI, dated Nov. 7, 2015, and found that Plaintiff sustained the following injuries: **"a nondisplaced focal fracture of the articular surface of the lateral tibial plateau of his right knee with joint effusion"**. [emphasis added] (*See* Dr. Prakash Affirmation, dated March 4, 2019).

Accordingly, the arthroscopic right knee surgery, performed by Dr. Ehrlich, consisted of "a partial medial and lateral menisectomy, chondroplasty of the medial femoral condyle, lateral tibial plateau and patella, and major synovectomy. Findings included Grade 2-3 (out of 4) chodral injury with meniscal tears."

With respect to Plaintiff's left shoulder, Dr. Prakash examined the MRI, dated Nov. 7, 2015, and found that Plaintiff sustained the following injuries: "a partial thickness tear of the posterior glenoid labrum of his left shoulder". (*See* Dr. Prakash Affirmation, dated March 4, 2019). In addition, the MRIs of Plaintiff's cervical, and lumbar, spines performed on Nov. 28, 2015, revealed that Plaintiff sustained herniations, among other things.

Dr. Ehrlich concluded that Plaintiff incurred significant and permanent

injuries to his right knee, and left shoulder, as a result of the motor vehicle accident that occurred on August 16, 2015. The pain and dysfunction continue to limit his ability to perform his activities of daily living. Plaintiff still exhibits significant decreased range of motion with tenderness, weakness, crepitus and positive provocative tests.

Dr. Ehrlich opines that the subject motor vehicle accident was the competent producing cause of the aforesaid traumatic injuries, based upon the objective findings, and the Plaintiff's history.

Accordingly, Plaintiff ROOPNARINE's doctors came to conclusions that were different from those of Defendant's experts. Thus, summary judgment is denied, since the conflicting doctors' reports raise issues of fact as to the "serious injury" categories of: permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a fracture.

As far as a fracture, the First Department held that a plaintiff's evidence established that he sustained serious injury under article 51 of the Insurance Law where a plaintiff sustained a fracture of the medial a fracture of the tibial plateau of his right knee. (*Lanpont v Savvas Cab Corp.*, 244 AD2d 208, 211 [1st Dept 1997]. *See Brownie v Redman*, 145 AD3d 636, 637 [1st Dept 2016]).

Likewise, Plaintiff ROOPNARINE's evidence, herein, raises genuine issues

of fact with regard to whether he sustained such a fracture – which is a “serious injury” category within the meaning of the Insurance Law.

Furthermore, as to both Plaintiffs, it is noted that, if a trier of fact determines that plaintiff sustained any injury that constitutes a “serious injury” as a result of the subject motor vehicle accident, Plaintiffs would be entitled to recover damages for all injuries causally related to the accident. (*Bonilla v Vargas-Nunez*, 147 AD3d 461, 462 [1st Dept 2017]). Plaintiffs also adequately explained any gaps in treatment by asserting that their no-fault insurance carrier denied further benefits and they were unable to pay for further treatment (*see Riollano v. Leavey*, 2019 N.Y. Slip. Op. 04660 [1st Dept. June 11, 2019], citing *Ramkumar v. Grand Style Transp. Enterprises, Inc.*, 22 N.Y.3d 905 [2013]).

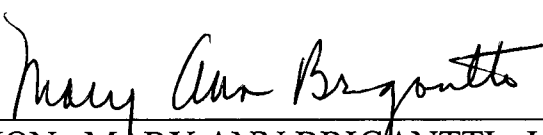
As for both Plaintiffs’ “90/180 day” injury claim, HANIFF testified that she was never advised to stay in bed by a doctor, and she returned to school in September after this August accident, and she was only directed to remain confined to her home after her December 2015 surgery for “six weeks” (Pl. EBT at 104-107), which defeats this claim (*see Fernandez v. Hernandez*, 151 A.D.3d 581 [1st Dept. 2017]). HANIFF’s further absence from work after her surgery is not determinative of her “90/180 day” injury claim (*see Nicholas v. Cablevision Systems Corp.*, 116 A.D.3d 567, 568 [1st Dept. 2014]). With respect to plaintiff ROOPNARINE, he admitted that he missed less than 90 days of work within the

180-day period, which establishes that he has no viable “90/180 day” injury claim (*see Stevens v. Bolton*, 135 A.D.3d 647, 647-48 [1st Dept. 2016]).

Accordingly, defendant PHILLIPS’ Motion for summary judgment on the issue of her liability is denied, and defendant DONGCHU’s Motion for summary judgment, alleging that Plaintiffs have not sustained serious injuries within the meaning of the Insurance Law, is granted only to the extent of dismissing both Plaintiffs’ “90/180 day” injury claims, and the motion is otherwise denied.

This constitutes the decision and order of this Court.

Dated: 6/24, 2019


HON. MARY ANN BRIGANTTI, J.S.C.