

Chahal v Humphrey

2020 NY Slip Op 33774(U)

July 29, 2020

Supreme Court, Schenectady County

Docket Number: 2017-1186

Judge: Michael R. Cuevas

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STATE OF NEW YORK
COUNTY OF SCHENECTADY

SUPREME COURT

PRESENT: HON. MICHAEL R. CUEVAS
JUSTICE OF THE SUPREME COURT

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2017-1186

PARVINDER K. CHAHAL,
Plaintiff,

DECISION AND ORDER

-against-

Index No.: 2017-1186
RJI No.: 46-1-2018-0862

AUSTIN E. HUMPHREY,
Defendants.

NOTICE:

PURSUANT TO ARTICLE 55 OF THE CIVIL PRACTICE LAW AND RULES, AN APPEAL FROM THIS JUDGMENT MUST BE TAKEN WITHIN 30 DAYS AFTER SERVICE BY A PARTY UPON THE APPELLANT OF A COPY OF THE JUDGMENT WITH PROOF OF ENTRY EXCEPT THAT WHERE SERVICE OF THE JUDGMENT IS BY MAIL PURSUANT TO RULE 2103 (B)(2) OR 2103 (B)(6), THE ADDITIONAL DAYS PROVIDED SHALL APPLY, REGARDLESS OF WHICH PARTY SERVES THE JUDGMENT WITH NOTICE OF ENTRY.

APPEARANCES:

Peter A. McDaniel, Esq., Conway & Kirby, PLLC, attorney for Plaintiff Parvinder K. Chahal

James A. Lombardo, Esq., Horigan, Horigan & Lombardo, P.C., attorney for Defendant Austin E. Humphrey

MICHAEL R. CUEVAS, J.

INTRODUCTION

Defendant Austin E. Humphrey ("Humphrey") moves this Court pursuant to CPLR §3212 for an Order granting summary judgment in his favor and dismissing Plaintiff Parvinder K. Chahal's ("Chahal's") Complaint in its entirety, with prejudice and on the merits. Chahal claims that she sustained a "serious injury," resulting from a motor vehicle

accident, under *Insurance Law* §5101, *et seq.* Chahal did not specifically articulate in either her Complaint or Bill of Particulars, what particular categories of injury she qualifies under. The definition of serious injury, generally states the following categories of applicable loss:

- (1) Death;
- (2) Dismemberment;
- (3) Significant disfigurement;
- (4) A fracture;
- (5) Loss of a fetus;
- (6) Permanent loss of use of a body organ, member, function or system;
- (7) Permanent consequential limitation of use of a body organ or member;
- (8) Significant limitation of use of a body function or system; and/or
- (9) 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.

Insurance Law §5102 (d). On Opposition to summary judgment, Plaintiff limited the applicable categories to: permanent consequential limitation, significant limitation, and impairment of substantially all of the material acts that constitute their usual and customary daily activities for not less than 90/180 days.¹

FACTUAL BACKGROUND

A. BACKGROUND

This action arises out of a rear-end motor vehicle accident that occurred on March

¹ *Opp.*, p. 15; Chahal argues that “defendant must provide admissible evidence showing that plaintiff did not suffer a serious injury under every category asserted by the plaintiff” in her Bill of Particulars. *Opposition*, p. 8. Interestingly, Chahal’s Bill of Particulars fails to identify the categories of serious injury she asserts. *Lombardo Aff.* ¶5, *Ex. D*, *McDaniel Aff.* ¶6, *Ex. 2*.

19, 2015. *Lombardo Aff.* ¶3, Ex. A; *McDaniel Aff.* ¶6, Ex. 1. Humphrey admits that he is at fault for the accident. *Id.* He was ticketed for tailgating. *Id.* The police report notes that Chahal was stopped in traffic when Humphrey struck her from behind. *Id.* The force of the collision caused Chahal's car to cross over the oncoming lane of traffic, go off the left shoulder of the road, and strike a guardrail- damaging it. *Lombardo Aff.* ¶3, Ex. A; *McDaniel Aff.* ¶6, Ex. 1. Humphrey admitted that he was looking down at his GPS and did not realize that traffic had stopped in front of him. *Id.* Chahal was driving a 2005 Mercedes four-door sedan owned by her husband Gurcharan Singh. *See, Lombardo Aff.* ¶4, Exs. B, D; *McDaniel Aff.* ¶6, Ex. 2. Humphrey was driving his own 1998 Jeep. *Id.*

The police report notes that there were no injuries at the scene of the accident. *Lombardo Aff.* ¶3, Ex. A; *McDaniel Aff.* ¶6, Ex. 1. Chahal did not leave the scene of the accident in an ambulance, as her husband drove her home. *Lombardo Aff.* ¶8, Ex. E, p. 29-30; *McDaniel Aff.* ¶6, Ex. 3. She later went to Ellis Family Practice complaining of pain in her neck and right knee. *Lombardo Aff.* ¶¶5, 8 Ex. D, E, p. 30-31; *McDaniel Aff.* ¶6, Ex. 2.

Chahal runs a grocery store with her husband called Markanda Grocery, that is located on Hamburg Street, in Schenectady, New York. *Lombardo Aff.* ¶¶5, 7, Exs. D, E, p. 5-6; *McDaniel Aff.* ¶¶6, Exs. 2, 3. She runs the register, cleans, and stocks the shelves. *Lombardo Aff.* ¶6, Ex. E Tr. 6:14-17; *McDaniel Aff.* ¶6, Ex. 3. Chahal and her husband both work seven (7) days a week. *Lombardo Aff.* ¶7, Ex. E, p. 7-8; *McDaniel Aff.* ¶6, Ex. 3. When the accident happened she worked seven (7) to eight (8) hours a day. *Lombardo Aff.* ¶6, Ex. E Tr. 7:2-8; *McDaniel Aff.* ¶6, Ex. 3. She claims she is unable to work as many hours now, but still works seven (7) days a week. *Lombardo Aff.* ¶6, Ex. E Tr. 7:9-14; *McDaniel Aff.* ¶6, Ex. 3. Although, she alleges she is unable to do as much now. *Lombardo Aff.* ¶6, Ex. E; *McDaniel Aff.* ¶6, Ex. 3. Chahal has worked there for seventeen (17) years. *Lombardo Aff.* ¶6, Ex. E Tr. 6:11-13; *McDaniel Aff.* ¶6, Ex. 3. She alleges that she was out of work from March 19, 2015 through April 2, 2015. *Lombardo Aff.* ¶¶5, 8,

Exs. D (No.4), E, p. 3; McDaniel Aff. ¶¶6, Exs. 2, 3. Chahal did not make a claim for no-fault lost wages. *Lombardo Aff. ¶8, Ex. E, p. 34-35; McDaniel Aff. ¶6, Ex. 3.*

B. BILL OF PARTICULARS

Chahal alleges she suffered injuries as a result of the accident on March 19, 2015, including: contusion of the forehead; swelling and bruising on the left temple; headaches; dizziness; fatigue; irritability; pain in the left temple down the neck into the left breast area rated as a 9/10; pain in the right knee rated as 8/10; pain in the left hip when she stands rated as a 6/10; mild tenderness of the left breast; moderate tenderness to palpation of the left neck; mild tenderness to palpation of the right knee; musculoskeletal myalgias; spasm of the paracervical muscles (left greater than right); pain in the left neck with rotation and lateral bend; neck pain/spasm with pain level 5-6/10; need for heating pad to help with neck pain; need for physical therapy to address injury of neck and knee pain; need to do neck and shoulder exercises as prescribed by physical therapist; inability to stand or sit for long time without exacerbating back pain; total inability to perform job in family owned shop from 3/9/15 to 4/2/15; emerging discomfort from low back pain; tenderness to palpation of lower mid-lumbar area; need for physical therapy for low back pain as well as for neck whiplash injury; prescription for Naproxen 500 mg 12 hours for back pain- right knee pain and neck pain; abnormal ROM in the cervical spine; extension of C-spine 25% with dizziness; side bend- right and left 50% rotation right and left 75%; need for educational learning regarding self-management; activity recommendations; HEP; posture and patho-anatomy/mechanics; muscle tightness in bilateral cervical paraspinal muscles; physical therapy (pt) to decrease muscle guarding and tension; patient needed some cuing with lateral pull to not lean right, but otherwise demonstrated little analgic behavior; need for core stability training; work stimulation when patient is able; diffuse pain/tenderness across left quadrants, L4/L5 radicular symptoms; need for continued core/upper body strengthening; patient needs to be cued as to posture and core engagement; need to add standing strengthening therapeutic exercise; need to

transition to full HEP program in October of 2015; need for evaluation of left buttock and leg pain; left side S1 radicular pain into the knee; loss of enjoyment of life; and pain and suffering. *Lombardo Aff. ¶15, Ex. D, McDaniel Aff. ¶6, Ex. 2, Bill of Particulars, No. 4.*

C. MEDICAL RECORDS

1. Ellis Primary Care

Chahal went to Ellis Primary Care on the date of the accident, or March 19, 2015. *Lombardo Aff. ¶15, Ex. F; McDaniel Aff. ¶6, Ex.4.*² She was diagnosed with whiplash, neck pain, knee pain, and contusion of her forehead. *Id.* There were no acute findings on the x-rays. *Id.* The records note swelling and bruising on her left temple. *Id.* Chahal told the facility that she did not lose consciousness, but she did have a mild headache. *Id.* The records also comment that she had pain in her left neck, left chest, and left hip. *Lombardo Aff. ¶15, Ex. F; McDaniel Aff. ¶6, Ex.4.* But that the most pain she was having was in her neck and right knee. *Id.* She was prescribed naproxen. *Id.* The range of motion testing performed came back as normal, and there was a notation of a mild spasm of the paracervical muscles, but no annotation of whether this was discovered via examination, or was self-reported. *Id.*

Chahal had radiology testing performed on March 20, 2015, that showed her cervical spine and knee were normal, with some degenerative changes in her cervical spine (C5-C6). *Lombardo Aff. ¶15, Ex. F; McDaniel Aff. ¶6, Ex.4.* She also self-reported that she was experiencing pain at the back of her neck with spasms when she turns her head, and a frontal headache. *Id.* She informed them that her knee pain was improving. *Id.*

On Plaintiff's April 2, 2015 visit to Ellis Primary Care, her musculoskeletal range of motion was found to be normal. *Lombardo Aff. ¶15, Ex. F; McDaniel Aff. ¶6, Ex.4.* The assessment detailed that Chahal started physical therapy for neck pain, two days earlier.

² The medical records actually show that the exam was on March 20, 2015, not March 19, 2015. *Lombardo Aff. ¶15, Ex. F; McDaniel Aff. ¶6, Ex.4.* But, then later state that she came in the day of the accident, which was March 19, 2015. *Id.*

Id. The summary denotes that all of the imaging was negative, plaintiff's neck pain/spasm was slightly improving, and that she was recommended physical therapy, naproxen, Flexeril, massage, and a heating pad. *Id.* It suggests that the neck pain and spasms were self-reported. *Id.*

On May 1, 2015, she appeared at the Primary Care office complaining about neck and back pain. *Lombardo Aff.* ¶15, *Ex. F*; *McDaniel Aff.* ¶6, *Ex.4*. This contradicts Defendant's assertion that she did not complain about any back pain until July 6, 2015. *Id.* The record indicates that Chahal had been evaluated three weeks prior for neck pain and spasms following a motor vehicle accident and detailed slight pain on extension of the neck despite her *full range of motion*. *Id.* Chahal reported that the therapy was going well and she self-reported that her neck pain, and spasms were improving. *Id.* Notably, there was no computed range of motion measurements in the record. *Id.* It was recommended Chahal continue therapy for three (3) more weeks, and to take naproxen as needed. *Lombardo Aff.* ¶15, *Ex. F*; *McDaniel Aff.* ¶6, *Ex.4*.

On June 4, 2015, Chahal went in for a follow-up visit. *Lombardo Aff.* ¶15, *Ex. F*; *McDaniel Aff.* ¶6, *Ex.4*. The medical record notes that she is to continue physical therapy. *Id.* It stated that she was back at work, working as a cashier. *Id.* She reported back pain from standing too long and it was suggested that she take mini breaks and sit, while continuing her exercises at home. *Id.* The record shows that she was unable to work from March 19, 2015 through April 2, 2015. *Lombardo Aff.* ¶15, *Ex. F*; *McDaniel Aff.* ¶6, *Ex.4*. There is a suggestion that this was a documented doctor's limitation. *Id.*

On July 6, 2015, Chahal reported for a follow-up visit for her lower back pain. *Lombardo Aff.* ¶15, *Ex. F*; *McDaniel Aff.* ¶6, *Ex.4*. She was sent to physical therapy for an additional four to six (4-6) weeks and advised to continue with naproxen as needed. *Id.* An x-ray of her lower back was performed on July 9, 2015 that showed *minimal* degenerative changes and *minimal* hypertrophic changes. *Id.*

At her visit on November 13, 2015, Plaintiff reported that she was having pain in the left side of her neck. *Lombardo Aff.* ¶15, Ex. F; *McDaniel Aff.* ¶6, Ex. 4. There was no range of motion testing performed, or other objective testing or results. *Id.*

Chahal's record of February 27, 2019, years after her accident, indicates no pain with range of motion testing and a normal range of motion for her left arm. *Lombardo Aff.* ¶15, Ex. F; *McDaniel Aff.* ¶6, Ex. 4.

2. Ellis Physical Therapy

The initial physical therapy notes detail that Chahal was diagnosed with whiplash. *Lombardo Aff.* ¶16, Ex. G. The record states that Chahal is to attend physical therapy one-to-two (1-2) times a week for four-to-six (4-6) weeks for the whiplash. *Id.* There are therapy notes from March 31, 2015, April 7, 2015, April 9, 2015, April 14, 2015, April 16, 2015, April 21, 2015, April 23, 2015, April 28, 2015, April 30, 2015, May 5, 2015, May 7, 2015, May 14, 2015, May 15, 2015, May 27, 2015, May 28, 2015, June 4, 2015, and June 9, 2015. *Id.* The first record post-accident³ found Chahal had a limited range of motion in her cervical spine. *Id.* Including a twenty-five (25) percent limitation in her cervical extension, accompanied by dizziness. *Id.* She also was found to have a fifty (50) percent reduction of range of motion in side bending her cervical spine to the left; and a fifty (50) percent reduction of range of motion in side bending her cervical spine to the right. *Lombardo Aff.* ¶16, Ex. G. She had a seventy-five (75) percent restriction in range of motion of her cervical spine in rotation to the left and a seventy-five (75) percent restriction in range of motion of her cervical spine in rotation to the right. *Id.* Chahal later complained of an issue with her back.⁴ *Id.* Her range of motion was tested and measured as a twenty-five (25) percent reduction in forward flexion of her lumbar back, a fifty (50)

³ The record is located at page 1 of Exhibit G to Lombardo's Affidavit. The record indicates that the injury date is 3/14/15, and the next doctor's visit is 4/2/15. There is also a fax receipt date of 5/1/16, and a print date of 6/1/15. It is unknown from the face of the document, what the actual date of service was. In her Opposition, Chahal states she believes that the date of service was 3/31/15.

⁴ The record details that the injury date was 3/19/15, it does not state a date for the next doctor's visit, has a fax receipt date of 10/8/15, and a print date of 10/27/15. There is no date on the record showing when this visit occurred. Chahal offered no information about when this visit occurred in her Opposition.

percent reduction in side bend of the lumbar spine to the right, and a fifty (50) percent reduction in side bend of the lumbar spine to the left. *Id.* No measurements were taken of her cervical spine. *Lombardo Aff.* ¶16, Ex. G. There was mild tenderness to palpation at the L4-S1 as well as mild tenderness to palpation at the paraspinal status. *Id.* Overall the records demonstrate that Chahal's situation is improving, and she only reports mild soreness. *Lombardo Aff.* ¶16, Ex. G. There was even a notation in the May 14, 2015 record that Chahal was performing activities, including cleaning her basement. *Id.*

There is a separate set of physical therapy notes for her back pain. *Lombardo Aff.* ¶16, Ex. G. There is a notation that the pain is aggravated by car rides, sitting, or standing for long periods of time. *Id.* The report states that Chahal should attend physical therapy for her back one-to-two (1-2) times a week for four-to-six (4 to 6) weeks. *Id.* Chahal was seen on the following dates at physical therapy for her back: August 4, 2015, August 11, 2015, August 13, 2015, August 18, 2015, August 20, 2015, August 25, 2015, September 1, 2015, September 3, 2015, September 10, 2015, September 15, 2015, September 24, 2015, October 1, 2015, and October 6, 2015. *Id.* Chahal initially reported a pain level of 7/10 which later was described as a 2/10. *Lombardo Aff.* ¶16, Ex. G. There is no indication of any range of motion testing.

3. OrthoNY

Chahal went to Ortho NY on February 19, 2016 and March 28, 2016, each time complaining of pain in her left buttock and leg that she reported was from a motor vehicle accident. *Lombardo Aff.* ¶17, Ex. H; *McDaniel Aff.* ¶6, Ex. 5. She indicated that physical therapy helped, but she was now experiencing pain again. *Id.* It was reported this was a recurrence of her sciatica. *Id.* The OrthoNY records specify that Chahal's x-rays showed a normal hip joint. *Id.* The x-rays of her lumbar spine were also normal. *Lombardo Aff.* ¶17, Ex. H; *McDaniel Aff.* ¶6, Ex. 5. She was sent for physical therapy. *Id.* No range of motion testing was reported.

4. OrthoNY Physical Therapy

Chahal went to physical therapy at OrthoNY PT on February 9, 2019 for her diagnosed sciatica. *Lombardo Aff. ¶18, Ex. I; McDaniel Aff. ¶6, Ex.5*. She was told to attend physical therapy two-to-three (2-3) days a week for four (4) weeks. *Id.* No range of motion testing was reported.

5. Schenectady Physical Therapy

The Schenectady Physical Therapy records detail that Chahal was diagnosed with sciatica at OrthoNY. *McDaniel Aff. ¶6, Ex.6*. The records demonstrate that treatment and exercises were performed, with no range of motion reported. *Id.*

A. DEPOSITION TESTIMONY

Parvinder K. Chalal was deposed on August 13, 2019. *Lombardo Aff. ¶6, Ex. E; McDaniel Aff. ¶6, Ex. 3*.

1. *Testimony Relating To The Accident*

The accident took place on March 19, 2015, at the intersection of Chrysler Avenue and Chapel Street, in Schenectady, New York. *Lombardo Aff. ¶6, Ex. E; McDaniel Aff. ¶6, Ex. 3, 15:4*. She was driving, with her seatbelt on, and there were no other passengers in the car. *Id.*, 15: 5-16. The air bag did not deploy. *Id.*, 15: 21-21. At the time of the accident she was headed into work. *Id.*, 16: 15-18:13. It was not raining or snowing that day. *Lombardo Aff. ¶6, Ex. E; McDaniel Aff. ¶6, Ex. 3, 19: 2-3*. Chahal was stopped, with her directional on, ready to make a left-hand turn onto Chapel Street. *Id.*, 20: 14-22:5. Chahal was hit from behind and her SUV travelled two car-lengths and crossed the opposite line, hitting the guard rail. *Id.*, 21: 17-22: 11, 22:23-23:7, 24:7-9. Her foot was on the brake at the time of the accident. *Id.*, 22: 12-15. She described the impact as heavy. *Lombardo Aff. ¶6, Ex. E; McDaniel Aff. ¶6, Ex. 3, 23: 17-21*.

2. *Testimony Relating To Her Injuries*

Chahal testified that she suffered injuries from the accident, including: headaches, neck pain, and back pain. *Lombardo Aff. ¶6, Ex. E; McDaniel Aff. ¶6, Ex. 3, 12:7-15*.

She believes her head hit the steering wheel, and her knee hit something below that. *Id.*, 24: 18-25: 11. She had blood over her left eye, a bruise, and her head and knee hurt. *Id.*, 24:23-25:16.

After the accident, her husband drove her home and then she went to Ellis Family Health to see her family doctor. *Lombardo Aff.* ¶6, *Ex. E*; *McDaniel Aff.* ¶6, *Ex. 3*, 30:2-23. They gave her a painkiller and told her to go to the emergency room because they were closing. *Id.*, 31: 15-19. Chahal stopped taking the medication she was given after a couple of months. *Id.*, 37.

Chahal went to physical therapy at Ellis. *Lombardo Aff.* ¶6, *Ex. E*; *McDaniel Aff.* ¶6, *Ex. 3*, 38: 8-10. They gave her exercises to do and they massaged her neck and back, and used heating pads. *Id.*, 40: 15-19. The therapy helped her. *Id.*, 40: 20-22. She then went to physical therapy on Carmen Road in Guilderland, New York for one-month. *Id.*, 41: 2-16. Chahal does not really remember going to OrthoNY and cannot say how many times she went there. *Lombardo Aff.* ¶6, *Ex. E*; *McDaniel Aff.* ¶6, *Ex. 3*, 41:23-43:7.

She cannot say whether she has seen any doctors for the injuries from the accident in the last year, and may have gone for an appointment relating to a headache. *Lombardo Aff.* ¶6, *Ex. E*; *McDaniel Aff.* ¶6, *Ex. 3*, 42, 43: 12-44:5. She alleges she has had headaches since the accident. *Id.*, 44: 6-22. Her headaches are better now than they were before. *Id.*, 44: 20-45:3. She gets them two-to-three (2-3) times a month. *Lombardo Aff.* ¶6, *Ex. E*; *McDaniel Aff.* ¶6, *Ex. 3*, 45: 4-11. She takes Ibuprofen for them. *Id.*, 45: 12-14. Her neck still hurts, more often in the morning. *Id.*, 47: 6-12. Her back still bothers her and sometimes she has to wear a belt. *Id.*, 47: 13-48:4. Although, her neck and back pain have improved. *Lombardo Aff.* ¶6, *Ex. E*, 47-48; *McDaniel Aff.* ¶6, *Ex. 3*. Her knee is also better now. *Id.*, 48: 5-7. Chahal testified that she had never been injured in a prior accident, and had not injured her neck or back previously. *Id.*, at 12:13-13:18. Since the accident she has not had any injuries to her neck, back, or right knee. *Lombardo Aff.* ¶6, *Ex. E*; *McDaniel Aff.* ¶6, *Ex. 3*, 49:21-50: 2.

3. *Chahal's Hobbies and Activities*

Chahal raised her children. *Lombardo Aff.* ¶6, *Ex. E*; *McDaniel Aff.* ¶6, *Ex. 3*, 50:7-22. She used to play badminton and basketball, but she doesn't do this anymore. *Id.* She never used to go anywhere and did not belong to any clubs, groups, or organizations. *Id.*, 50:7-23.

PROCEDURAL SUMMARY

Chahal filed a Summons and Complaint on June 12, 2017. *Lombardo Aff.* ¶4, *Ex. B*. Humphrey filed an Answer on or about February 9, 2018. *Lombardo Aff.* ¶4, *Ex. C*. Chahal responded to the Bill of Particulars on or about March 13, 2019. *Lombardo Aff.* ¶5, *Ex. D*. Defendant filed a notice of motion, and affidavit for summary judgment on February 20, 2020. Plaintiff served an Opposition and Answering Affidavit to same on June 15, 2020. Defendant submitted a Reply brief on June 23, 2020. There were no expert affidavits submitted in support, or in opposition of the summary judgment motion.

THE LAW AND DISCUSSION

A. STANDARD OF LAW

The 1973 enactment of *Insurance Law* §5101, *et seq.*, also known as the “No-Fault Law,” was intended to “correct certain infirmities...under the common-law tort system of compensating automobile accident claimants.” *Licari v. Elliot*, 57 N.Y. 2d 230 (1982). There is no right of recovery for pain and suffering, exclusive of a serious injury. *Id.* It is implicit in the No-Fault Law that any injury falling outside the statutory definition of “serious injury” may not proceed in litigation. *Id.*

A defendant seeking summary judgment on the grounds that a plaintiff's claimed injuries are not serious within the definition of *Insurance Law* must establish that plaintiff's injuries do not meet the statutory threshold.

Insurance Law §5102 (d) defines “serious injury” 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 eight days immediately following the occurrence of the injury or impairment.

It is well-settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. See, *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Bhatti v. Roche*, 140 A.D.2d 660 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. See, *Friends of Animals, Inc., v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See, CPLR § 3212 (b); *Olan v. Farrell Lines, Inc.*, 64 N.Y.2d 1092 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See, *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). When considering a motion for summary judgment, the function of the court is not to resolve issues, but rather to determine if any such material issues of fact exist. See, *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See,

Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See, *Barr v. Albany County*, 50 N.Y.2d 247 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312 (2d Dept. 1989).

B. WHETHER DEFENDANT SHIFTED THE BURDEN TO PLAINTIFF TO SHOW THE EXISTENCE OF A TRIABLE ISSUE OF MATERIAL FACT.

While a defendant may rely upon a plaintiff's medical records to show that no serious injury was sustained, and an expert's affidavit is not required, the proof relied upon must establish that the injuries were not as severe as alleged. *Seymour v. Roe*, 301 A.D. 2d 991 (3d Dept. 2003), *Franchini v. Palmieri*, 1 N.Y. 3d 536 (2003), *Felton v. Kelly*, 44 A.D. 3d 1217 (3d Dept. 2007), *Oeffler v. Miles*, 241 A.D. 2d 822 (3d Dept. 1997), *Cody v. Parker*, 263 A.D. 2d 866 (3d Dept. 1999), *Tankersley v. Szesnet*, 235 A.D. 2d 1010 (3d Dept. 1997), *Torres v. Micheletti*, 208 A.D. 2d 519 (2d Dept. 1994), *Hochlerin v. Tolins*, 186 A.D. 2d 538 (2d Dept. 1992).

In *Perl v. Meher*, the Court of Appeals addressed three cases dismissed under the serious injury law and found that the first two had been improperly dismissed. *Perl v. Meher*, 18 N.Y. 3d 208 (2011). While the Court detailed that subjective complaints alone are not sufficient to support a claim of serious injury, it also detailed that to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. *Id.* The expert's qualitative assessment may suffice provided that it has an objective basis and compares the plaintiff's limitations to the normal function, purpose, and use of the affected body organ, member, function, or system. *Id.* In the *Perl* action, the defendant did not make out a *prima facie* case for summary judgment because Defendant's own

doctor conceded that the objective test results provided that plaintiff sustained a serious injury. *Id.* After finding that plaintiff had limitations, the defense doctor then dismissed those limitations by subjectively opining that the plaintiff was “exaggerating” those symptoms. *Perl, supra*, 18 N.Y. 3d, at 208; *see also, India v. O’Connor*, 97 A.D. 3d 796 (2d Dept. 2012). The Court ruled that the subjective opinion that plaintiff was exaggerating the symptoms was an issue of credibility for the jury to determine. *Id.* The court also noted that defendants never provided their examining physicians with any of the plaintiff’s medical records. *Id.* The Court of Appeals ultimately ruled that because defendants failed to meet their initial burden, their motion should have been denied regardless of the sufficiency of the opposing papers. *Id.* The Court also ruled that plaintiffs raised a question of fact by presenting defendant’s doctor’s qualitative assessment that plaintiff sustained a serious injury. *Perl, supra*, 18 N.Y. 3d, at 208.

Similarly, in *Seymour v. Roe*, defendant moved for summary judgment without an affidavit, affirmation, or the testimony of a medical or other expert. *Seymour v. Roe*, 301 A.D. 2d 991 (3d Dept. 2003). He relied on plaintiff’s deposition testimony, limited medical records of treating physicians, diagnostic reports, physical therapy progress notes, and other documentary evidence related to prior injuries. *Id.* The Third-Department determined that defendant’s proof did not show that the injuries were not as severe as alleged, and the records did not define medical terms or state whether the injuries were caused by the accident or were preexisting conditions. *Id.* Let alone, the evidence did not address causation. *Id.*

Here, Humphrey relies on Chahal’s medical records and her deposition testimony, to shift the burden to Chahal to present objective medical evidence to rebut her entitlement to summary judgment. The evidence submitted by Humphrey is not enough to shift the burden. Chahal’s medical records diagnose her with, among other injuries:

- Contusion of the forehead
- Injury of the Neck/Whiplash

- Knee pain, right
- Neck pain
- Back pain

Notably, in approximately March 2015, Ellis Physical therapy⁵ found Chahal had a limited range of motion in her cervical spine. Including a twenty-five (25) percent limitation in her cervical extension, accompanied by dizziness. She was also found to have a fifty (50) percent reduction of range of motion in side bending her cervical spine to the left and a fifty (50) percent reduction of range of motion in side bending her cervical spine to the right. She had a seventy-five (75) percent restriction in range of motion of her cervical spine in rotation to the left and a seventy-five (75) percent restriction in range of motion of her cervical spine in rotation to the right. Chahal later complained of an issue with her back around October 2015. Her range of motion was tested and measured as a twenty-five (25) percent reduction in forward flexion of her lumbar back, a fifty (50) percent reduction in side bend of the lumbar spine to the right, and a fifty (50) percent reduction in side bend of the lumbar spine to the left. No measurements were taken of her cervical spine. There was mild tenderness to palpation at the L4-S1 as well as mild tenderness to palpation at the paraspinal status.

The substance of the medical records demonstrate that Chahal has/had a limited range of motion and ultimately fails to address whether that limitation is in fact significant.

⁵ The definition of physical therapist is outlined in *NY Educ. Law Section 6731*. It provides: The evaluation, treatment, or prevention of disability, injury, disease, or other condition of health using physical, chemical, and mechanical means including, but not limited to heat, cold, light, air, water, sound, electricity, massage, mobilization, and therapeutic exercise with or without assistive devices, and the performance and interpretation of tests and measurements to assess pathophysiological, pathomechanical, and developmental deficits of human systems to determine treatment, and assist in diagnosis and prognosis. The use of roentgen rays or radium, or the use of electricity for surgical purposes such as cauterization shall not be included in the practice of physical therapy. Such treatment shall be rendered pursuant to a referral which may be directed as treatment by a licensed physician, dentist or podiatrist and in accordance with their diagnosis. *Caputo v. Cradle*, 111 Misc. 2d 242 (Nassau County Ct. 1981). While a physical therapist cannot make a diagnosis or prognosis, their range of motion measurements are made a part of an injured party's medical records for use by a qualified expert in making a diagnosis or prognosis. *Id.* In *Caputo*, the court found that a triable issue of fact exists where a physical therapist offers objective evidence, even where there is no supporting testimony of a physician. *Id.*

As indicated in *Perl*, whether Chahal's range of motion testing and exclamations of pain are an over-exaggeration is merely a question of credibility that is for a jury to decide. See, *Perl, supra*, 18 N.Y. 3d, at 208.

Humphrey's reliance on plaintiff's deposition testimony, medical records of her treating physicians, diagnostic reports, and physical therapy progress notes do not provide any foundation to show that Chahal's injuries were not as severe as alleged. *Seymour*, 301 A.D. 2d, at 991. Additionally, as in *Seymour*, the records did not define medical terms or establish how the range of motion results deviated from normal, or not. *Id.* For these reasons, this Court finds that Humphrey failed to shift the burden to Chahal to show a triable issue of material fact. Regardless, even if this Court found Humphrey shifted the burden, Chahal has established a triable issue of fact exists.

C. PERMANENT CONSEQUENTIAL LIMITATION/SIGNIFICANT LIMITATION OF USE OF BODY FUNCTION OR SYSTEM

The categories of permanent consequential limitation of use and significant limitation of use both require medical proof including a qualitative determination of the alleged injury as compared with normal function. See, e.g., *Shea v. Ives*, 137 A.D. 3d 1404 (3d Dept. 2016), *Pommells v. Perez*, 4 N.Y. 3d 566 (2005). Quantitative loss need not be permanent, but the degree of the injury must be more than minor or slight. *Id.* Medical evidence that does no more than describe minor limitations of use combined with subjective complaints and symptoms of pain, is insufficient. *Kimball v. Baker*, 174 A.D. 2d 925 (3d Dept. 1991). In *Negrete v. Hernandez*, the Second Department found that plaintiff's bulging cervical discs with a painful restriction of motion by more than 15% with spasm and guarding was enough to raise a triable issue of fact. *Negrete v. Hernandez*, 2 A.D. 3d 511 (2d Dept. 2003). In *Mazo v. Wolofsky*, the Second Department found that plaintiff's use of a physician's affidavit to show cervical and lumbar range of motion decrease of 20% or more was enough to raise a triable issue of fact as to the seriousness

of plaintiff's injuries. *Mazo v. Wolofsky*, 9 A.D. 3d 452 (2d Dept. 2004). The Third Department in *Stanavich v. Pakenas*, found that where pain limits range of motion, and there is objective proof of that limited range of motion, along with an expert's testimony to substantiate the limitation, a serious injury may be found. *Stanavich v. Pakenas*, 190 A.D. 2d 184 (3d Dept. 1993).⁶ Additionally, that the various findings of tenderness, tightness, muscle spasm, trigger points, and decreased range of motion do qualify as objective proof of a physical injury. *Id.*

In this matter, Ellis Physical therapy found Chahal to have a limitation in her range of motion to the cervical spine and back, at degrees greater than the 20 degrees noted by the Second Department to be enough to constitute a question of whether plaintiff suffered a serious injury. Overall the records demonstrate that Chahal's situation improved over time, and even contradicted the objective findings establishing a limitation in range of motion, finding a normal range of motion. Additionally, Chahal only reports mild soreness or symptoms over time. Because the medical records establish that Chahal's situation improved over-time she would be unable to evidence a permanent consequential limitation. However, because Ellis Physical Therapy detailed objective testing showing that Chahal has/had limitations to her range of motion, a triable issue of fact has been established in relation to whether that limitation existed, and whether it constitutes a significant limitation of the use of a body function or system.⁷

D. 90/180 DAYS

To establish whether plaintiff was unable to perform substantially all of their usual and customary activities for 90 out of 180 days, following the accident, plaintiff must establish:

⁶ Notably, the Court in *Stanavich* ultimately ruled that defendant's directed verdict should have been granted since plaintiffs' expert testimony as to permanency of the injury was speculative. *Stanavich v. Pakenas, supra*, 190 A.D. 2d, at 184.

⁷ The contradictory findings between range of motion testing performed raise a triable issue of fact. As stated in *Baki*, "where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varied inferences may be drawn, the question is one for the jury. *Baki v. Valcourt*, 2013 N.Y. Misc. LEXIS 74 (New York County Ct. 2013); citing to *Martinez v. Pioneer Transp. Corp.*, 48 A.D. 3d 306 (1st Dept. 2008).

1. That substantially all of the plaintiff's usual and customary activities were unable to be performed;
2. The activities were unable to be performed due to an objective medical problem; and
3. Any alleged activity restrictions were medically indicated.

Buster v. Parker, 1 AD 3d 659 (3d Dept. 2003), *Horowitz v. Clearwater*, 176 A.D. 2d 1083 (3d Dept. 1991). Courts give weight to a medial determination that a plaintiff was totally disabled as a result of an accident, provided that determination is supported by objective, non-conclusory, credible medical findings. *Relin v. Brotherton*, 221 A.D. 2d 840 (3d Dept. 1995), *Monk v. Dupuis*, 287 A.D. 2d 187 (3d Dept. 2001). The Court requires a plaintiff to support a claim that restrictions on his or her activities were medically indicated and causally related to the injuries sustained in the accident. *Id.* On a 90/180 claim a plaintiff must also demonstrate that his or her usual activities were curtailed to a great extent rather than some slight curtailment. *Id.*; *Licari, supra*, 57 N.Y. 2d, at 230.

The evidence here establishes that Chahal only missed a maximum of 3 to 4 weeks of work. Moreover, no doctor restricted her activities after this time-period, despite Chahal's testimony that her work and home activities were restricted following the accident. For these reasons, the evidence has not shown plaintiff can establish a triable issue of material fact that a jury may find in her favor under the 90/180 category of serious injury.

CONCLUSION

Humphrey has not established a *prima facie* entitlement to summary judgment and the burden has not shifted to Chahal to show a triable issue of material fact on the categories of serious injury under *Insurance Law* §5102, *et seq.* Even if Humphrey was able to shift the burden, Chahal can establish a triable issue of fact under the category of


significant limitation of use of a body function or system. Therefore, Humphrey's summary judgment request is hereby denied, without prejudice, in all respects.

THE COURT'S RULING

ORDERED that the defendant's motion for summary judgment dismissing the complaint is denied without prejudice, in it's entirety.

ORDERED that this decision constitutes the Order of this Court.

Dated: July 29, 2020
at Schenectady, New York


HON. MICHAEL R. CUEVAS
Supreme Court Justice

Papers Considered:

Moving Papers

Notice of Motion

Affidavit of James A. Lombardo, Esq.

- Exhibit A: Police Report
- Exhibit B: Summons and Complaint
- Exhibit C: Answer
- Exhibit D: Bill of Particulars
- Exhibit E: Parvinder K. Chahal's Deposition Testimony
- Exhibit F: Ellis Primary Care Records
- Exhibit G: Ellis PT Records
- Exhibit H: OrthoNY Records
- Exhibit I: OrthoNY Physical Therapy Records

Reply Affidavit of James A. Lombardo, Esq.

Proof of Mailing- Reply Affidavit

Opposition Papers

Memorandum of Law In Opposition to Defendant's Motion for Summary Judgment

Affidavit of Peter A. McDaniel, Esq., In Opposition to Defendant's Motion for Summary Judgment

- Exhibit 1: Police Report
- Exhibit 2: Verified Bill of Particulars
- Exhibit 3: Parvinder Chahal's deposition transcript
- Exhibit 4: Certified Medical Records from Ellis Family Medicine
- Exhibit 5: Certified Medical Records of OrthoNY

ENTERED
AUG 11 2020
Schenectady County Clerk's Office

Exhibit 6: Certified Medical Records of Schenectady Physical Therapy
Exhibit 7: Decision and Order of Hon. Michael R. Cuevas

Affidavit of Service by Mail