At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of August, 2020.

P R E S E N T:

HON. BRUCE M. BALTER,

Justice.

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CLIVE B FRYS AND NORVLETT FRYS,

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 511974/18

PAUL STEPHENSON,

Defendant,

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The following e-filed papers read herein:	NYSCEF Doc. Nos.[1]
Notice of Motion, Affirmations and Annexed Exhibits	21-29
Opposing Affirmations with Annexed Exhibits	30-33
Reply Affirmations	34

Upon the foregoing papers, defendant Paul Stephenson (Stephenson) moves, in motion sequence (mot. seq.) two, for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the claims of plaintiffs, Clive B Frys (Frys) and Norvlett Frys on the grounds that they cannot meet the

[1] New York State Courts Electronic Filing Document Numbers

serious injury threshold requirement as mandated by Insurance Law §§ 5104 (a) and 5102 (d). Plaintiffs oppose.

Background Facts and Procedural History

The instant action arises out of a March 1, 2017 automobile accident between the parties in which Mr. Frys allegedly suffered injuries. According to the plaintiffs, Mr. Frys was crossing the street on foot when a vehicle driven by Mr. Stephenson struck him. The car impacted with the right side of Mr. Frys' back, he fell on the bonnet (i.e. the hood) of the car, and then landed on the road striking his right shoulder, arm, and knee. Mr. Frys was taken to the hospital by ambulance, was released later that night and subsequently saw his own physician and a variety of specialists. He thereafter underwent surgery for a torn meniscus in his right knee and for a torn rotator cuff and labrum in his right shoulder. Mr. Frys stated that he was out of work for over a year as a result of his injuries, that he was only able to return on reduced hours, and that he continues to work on this basis. Additionally, Mr. Frys has attested to continuing pain in his right knee, right shoulder, and back and mobility limitations causing both restricted movement speed and difficulty climbing stairs as well as affecting his ability to lift, kneel, and mop.

Filing of a summons and complaint on June 11, 2018 commenced this lawsuit, and issue was joined by the filing of an answer on Mr. Stephenson's behalf in August 2018. A preliminary conference, compliance conference, and

final pre-note conference were all held, and a note of issue filed on August 2, 2019. Mr. Stephenson thereafter timely filed the instant summary judgment motion.

Analysis

It is well settled that "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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see also Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]) [internal citations omitted]). "The court's function on a

motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; *see also Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

Pursuant to Insurance Law § 5104 (a),

> "[n]otwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss."

§ 5102 (d) defines "serious injury," in relevant part, as

> "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; 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."

In addition, case law recognizes that

> "[A] defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. The plaintiff in such a situation must present objective evidence of the injury" (*Grossman v. Wright*, 268 AD2d 79, 83-84 [2d Dept 2000][internal citations omitted]).

It is well settled that establishing a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system requires medical evidence providing either a quantitative or qualitative assessment. Indeed, the Court of Appeals in *Toure v. Avis Rent A Car Systems, Inc*, 98 NY2d 345, 350 [2002]) explained that in seeking objective evidence

> "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. An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation 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."

Correspondingly, it is also well established that "[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and that

she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d)" (*Kearse v. New York City Tr. Auth.*, 16 AD3d 45, 49-50 [2d Dept 2005]).

The Court of Appeals subsequently addressed a plaintiff's burden opposing a defendant's challenge to a serious injury claim and refined applying the quantitative approach by its unanimous ruling in *Perl v Meher* (18 NY3d 208 [2011]). There, it held (*id.* at 217) that "[u]nder the "quantitative" prong of *Toure*...numerical measurements are sufficient to create an issue of fact as to the seriousness of [plaintiffs'] injuries." The decision mentioned that *Perl's* doctor at his initial examination following the accident had only generally observed that Perl's range of motion restriction was "less than 60% of normal in the cervical and lumbar spine" (*id.* at 217). However, the decision recognized that the doctor again examined him "years later, using instruments to make specific, numerical range of motion measurements" (*id.*). The *Perl* decision emphasized that *Toure* required no quantitative measurements "contemporaneous" to the accident demonstrating restricted range of motion, "and we see no justification for it" (*id.*). The decision directly states in this regard that "We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery" (*id.* at 218). Hence, some specific, numerical range of motion measurements suffice.

In support of his motion, Mr. Stephenson offers the affirmations of Drs. Alan J Zimmerman, M.D. and Eric Postal, M.D. Dr. Zimmerman, an orthopedist, examined Mr. Frys and reviewed pertinent medical records. He found that Mr. Frys had full range of motion of his knee/leg, spine, and shoulder and concluded that there were no findings which would result in orthopedic limitations in the use of the body parts examined. Dr. Zimmerman also opined that the arthroscopic surgeries on Mr. Frys' knee and shoulder were unnecessary and carried out for degenerative rather than causally-related conditions.

Dr. Postal, a radiologist, examined the MRIs of Mr. Frys' right shoulder and right knee and concluded that the damage seen therein resulted from pre-existing degeneration rather than recent traumatic injury. He noted the absence of a meniscal tear and posited that the presence of bone cysts and lack of swelling show that the low grade, chronic tears in the shoulder tendons were not caused by the accident.

In opposition, plaintiffs present affirmations from Mr. Frys' treating physicians. Dr. Pushp R Bhansali states that he first saw Mr. Frys in April 2017, and Mr. Frys then complained about shoulder, knee, and neck pain. Dr. Bhansali found, upon testing him on April 13, 2017, that Mr. Frys had

significantly impaired cervical, lumbosacral, shoulder, and knee motion.[2] Two months of physical therapy proved ineffective, and Mr. Frys underwent arthroscopic surgery to address a traumatic tear to the meniscus and anterior cruciate ligament in his right knee. Dr. Bhansali, who also attests to having reviewed Mr. Frys' MRIs, reports that Mr. Frys still had movement deficits in his shoulder and knee in late 2019 and concluded that his restrictions were permanent and attributable to the March 1, 2017 accident.[3]

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[2] More specifically, Dr. Bhansali reports (*see* his affirmation, NYSCEF Doc. No. 32, at second unnumbered page, ¶ 5, annexed as exhibit B to plaintiffs' opposition papers in mot. seq. two) Mr. Frys' cervical spine ranges of motion were flexion 40 degrees (normal is 45 degrees), extension is 30 degrees (60 is normal), right lateral flexion 20 degrees (45 is normal), left lateral flexion 20 degrees (45 is normal), right rotation 40 degrees (80 is normal), and left rotation 40 degrees (80 is normal).

In addition, Dr. Bhansali reports Mr. Frys' lumbar spine ranges of motion were flexion 30 degrees (normal is 60 degrees), extension 10 degrees (25 is normal), right side bending 15 degrees (25 is normal), left side bending 15 degrees (25 is normal), right rotation 45degrees (80 is normal), and left rotation 45degrees (80 is normal).

Dr. Bhansali also reported that Mr. Frys' right shoulder was positive for the impingement sign and his right knee had a positive McMurray's test (i.e., a test used to determine the presence of a meniscal tear within the knee). Mr. Frys, as mentioned above, thereafter underwent both shoulder surgery and arthroscopic knee surgery.

[3] The court rejects defendant's argument about a gap in treatment (*see* NYSCEF Doc. No. 22, affirmation of defendant's counsel at 8, ¶ 26, annexed to defendant's moving papers in mot. seq. two). Dr. Bhansali and Dr. Burstzyn both testify about the period of initial treatment. They also specify the results of their subsequent examinations during the pendency of the instant motion, which reflect consultations almost certainly done to provide a response to examinations by defendant's doctors. These consultations, collectively, reference prior treatment including reviewing Mr. Frys' MRIs, discuss plaintiff's knee and shoulder surgeries, and provide progress notes. Neither doctor attempts to testify as to periods that they were not treating Mr. Frys.

Mr. Frys also consulted Dr. Mark Burstzyn, who treated his right shoulder and found, upon reading Mr. Frys' MRIs, changes consistent with a possible anterior labral tear. Surgery was performed which revealed to Dr. Burstzyn a partial thickness tear of the rotator cuff, a type I Superior Labrum Anterior and Posterior (SLAP) lesion (i.e., a tearing of the anterior and posterior labra), and glenohumeral synovitis (i.e., shoulder joint inflammation). These findings in Dr. Burstzyn's opinion were traumatic injuries consistent with the accident. Dr. Burstzyn again examined Mr. Frys on January 10, 2020 and found that he still suffers from right shoulder mobility limitations which appear to be permanent.[4]

In sum, Mr. Stephenson presents medical testimony that the MRIs show no injuries resulting from the accident, no meniscus tear, and insignificant, unrelated chronic tears in the shoulder tendons. Further, according to Dr. Zimmerman, Mr. Frys had full range of motion of spine, shoulder, and knee when examined and showed no orthopedic limitations affecting those body parts. Plaintiffs, on the other hand, present affirmations from Mr. Frys' treating physicians, who collectively identified his various injuries and provided specific, numerical range of motion measurements, as *Perl* stresses, personally reviewed his MRIs, and noted that his right knee and right shoulder

[4] More specifically, Dr. Burstzyn reports (*see* his affirmation, NYSCEF Doc. No. 33, at second-third unnumbered page, ¶ 10, annexed as exhibit C to plaintiffs' opposition papers in mot. seq. two) Mr. Frys' right shoulder ranges of motion were flexion 120 degrees (normal is 180), abduction 120 degrees (normal is 180), internal rotation to L5 (normal is to T12) and external rotation 85 degrees (normal is 90).

injuries were surgically treated. Dr. Burstzyn offers January 10, 2020 test results supporting his conclusion that the patient continues to suffer from mobility limitations to his right shoulder. Indeed, he opines that "these findings and limitations of motion in Mr. Frys' right shoulder are all permanent and causally related to the accident of March 1, 2017, which is deemed to be the etiological factor in causing all of these injuries" (*id.* at third unnumbered page, ¶ 12). He adds that

> "[t]he fact that as recently as January 10, 2020 he was still significantly symptomatic is demonstrative of the fact that he has significant limitation of use of the right shoulder. That these symptoms, both contemporaneous to the accident and recent, both objective and subjective have continued for almost three (3) years since the accident compels me to conclude additionally that his continued impaired motion and use . . . must be deemed to be permanent and causally related to the accident of March 1, 2017" (*id*).

A series of comparable Appellate Division Second Department decisions presenting similar range of motion restrictions affecting the same body areas as in this case have denied summary judgment citing the *Perl* decision (*see Sepe v Barravecchio*, 175 AD3d 1580, 1581 [2d Dept 2019] [50% restrictions in cervical and lumbar spinal regions three and a third years after accident]; *Diaz-Montez v JEA Bus Co., Inc.*, 175 AD3d 1384, 1385-1386 [2d Dept 2019] [33% restriction in extension of right knee two and two-thirds years after accident]; *Chichester v Chichester*, 174 AD3d 846, 847 [2d Dept 2019] [up to 63% right shoulder restriction more than three and a half years after accident]; *Delp v Guerra*, 173 AD3d 681, 682-683 [2d Dept 2019] [range

of motion restrictions of up to 40% in cervical and lumbar spinal regions four years after accident]; *Kelly v Andrew*, 172 AD3d 833, 834 [2d Dept 2019] [22% deficit in flexion of the lumbar region of the plaintiff's spine four years after accident]; *Munoz v Salcedo*, 170AD3d 735, 736-737 [33% restriction in lumbar flexion nearly four years after accident]; *Ye Jin Han v Karimzada*, 169 AD3d 1109, 1110 [2d Dept 2019] ["significant loss of range of motion" in right shoulder from September 2013 accident]; *Kholdarov v Hyman*, 165 AD3d 1087, 1088 [2d Dept 2018] [20% deficit in flexion of plaintiff's cervical spine six and a half years after accident]; *Barnes v New York City Tr. Auth.*, 154 AD3d 800, 801 [2d Dept 2018] ["significant limitations in the range of motion of Barnes' left shoulder" from 2011 accident]). In light of the contradictory medical testimony and the clear factual disputes as to the scope, cause, and duration of Mr. Frys' injuries, summary judgment is inappropriate as to the significant limitations claims.

In order to prove serious injury under the 90–out–of–180–day rule, Mr. Frys must present evidence that the injuries he suffered as a result of the subject accident curtailed him from performing his usual and customary activities to a great extent for the requisite 90/180–day period (*see Lanzarone v. Goldman*, 80 AD3d 667, 669 [2d Dept 2011]; *see also Gaddy v. Eyler*, 79 NY2d 955, 958 [1992]). Mr. Stephenson argues based on Dr. Postal's affirmation that there was no causal medically-determined injury and, thus, that

this category is inapplicable. However, as discussed above, Drs. Bhansali and Burstzyn opine to the contrary. Mr. Stephenson further argues that Mr. Frys was only confined to his home six or eight times total and, therefore, his usual and customary activities were not greatly curtailed. However, Mr. Frys testified that he was unable to work for more than a year after the accident – he previously had a full time job – and was unable to even attend church for a month (and still cannot kneel). As such, issues of fact remain as to whether Mr. Frys sustained a medically-determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. Accordingly, it is

ORDERED that Mr. Stephenson's summary judgment motion, mot. seq. two, is denied.

This constitutes the decision and order of the court.

ENTER:

Bruce M. Balter
J. S. C.