

<b>Morseman v Richardson</b>
2020 NY Slip Op 35078(U)
December 27, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 625017/2018
Judge: Sanford Neil Berland
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SHORT FORM ORDER

INDEX 625017/2018

CAL. No. 202000288MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. SANFORD NEIL BERLAND  
Acting Justice of the Supreme Court

MOTION DATE 7/21/20

ADJ. DATE 8/4/20

Mot. Seq. # 001 MD

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JOAN M. MORSEMAN,  
Plaintiff,

FABER & TROY, ESQS.  
Attorney for Plaintiff  
180 Froehlich Farm Blvd.  
Woodbury, New York 11797

- against -

SAUNDRA O. RICHARDSON and CHINYERE  
RICHARDSON,  
Defendants.

ROE & ASSOCIATES  
Attorney for Defendants  
1055 Franklin Avenue, Suite 204  
Garden City, New York 11530

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by defendants, filed June 2, 2020;; Answering Affidavits and supporting papers by plaintiff, filed July 21, 2020; and Replying Affidavits and supporting papers by defendants, filed August 3, 2020, it is

**ORDERED** that the motion by defendants for summary judgment dismissing the complaint is denied.

Plaintiff Joan Morseman commenced this action to recover for damages she allegedly sustained as a result of a motor vehicle accident that occurred on July 17, 2018, on Old Town Road, approximately 100 feet south of Sheep Pasture Road, in Brookhaven, New York. According to plaintiff, the accident occurred when a vehicle operated by defendant Saundra Richardson and owned by defendant Chinyere Richardson backed out of a driveway onto Old Town Road and struck plaintiff's vehicle. By her complaint, as amplified by her verified bill of particulars, plaintiff alleges she sustained various injuries and symptoms as a result of the subject accident, including, a disc herniation at C7-T1, and disc bulges at T5-T6, T6-T7, L3-L4, L4-L5, and L5-S1. Plaintiff also claims that the subject accident aggravated a degenerative condition in her cervical spine.

Defendants now move for summary judgment dismissing the complaint. They contend that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support of their motion, defendants submit, among other things, the affirmed report of their examining physician, Dorothy

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Scarpinato, M.D., and excerpts of the transcript of plaintiff's deposition testimony. In opposition, plaintiff argues that triable issues of fact exist as to whether she sustained a serious injury as a result of the subject accident. In support of her opposition, plaintiff submits, among other things, various medical records and the affirmed report of her treating physician, Matthew Kalter, M.D.

Insurance Law § 5102 (d) defines "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing, *prima facie*, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Bong An v Villas-Familia*, 183 AD3d 582, 121 NYS3d 675 [2d Dept 2020]). Findings of a defendant's own witnesses must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to summary judgment (*see Loadholt v New York City Tr. Auth.*, 12 AD3d 352, 783 NY2d 660 [2d Dept 2004]; *Marsh v Wolfson*, 186 AD2d 115, 587 NYS2d 695 [2d Dept 1992]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and uncertified records prepared by the plaintiff's treating medical providers (*see Uribe v Jimenez*, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; *Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Estaba v Quow*, 74 AD3d 734, 902 NYS2d 155 [2d Dept 2010]; *Guzman v New York City Tr. Auth.*, 15 AD3d 541, 790 NYS2d 217 [2d Dept 2005]).

A plaintiff who is opposing a defendant's motion for summary judgment under Insurance Law § 5102 (d) and claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*see Bamundo v Fiero*, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based upon a recent examination or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *McEachin v City of New York*, 137 AD3d 753, 25 NYS3d 672 [2d Dept 2016]). Proof of a herniated disc or a bulging disc is insufficient to establish a "serious injury" within the meaning of the statute without objective medical evidence establishing the extent and duration of the alleged limitation (*see Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; *Stevens v Sampson*, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; *Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Further, an injury must be medically

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determined and must be casually related to the accident to qualify as a serious injury under the 90/180-day category (see *Dembowski v Morris*, 184 AD3d 741, 124 NYS3d 245 [2d Dept 2020]; *Nicholson v Bader*, 105 AD3d 719, 962 NYS2d 350 [2d Dept 2013]; *Kapeleris v Riordan*, 89 AD3d 903, 933 NYS2d 92 [2d Dept 2011]). Specifically, the plaintiff's usual activities must have been curtailed to a "great extent" to satisfy the 90/180-day category (*Licari v Elliott*, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

Defendants submissions sufficiently make out a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*; *Narvaez-Reyes v Palomino*, 186 AD3d 492, 126 NYS3d 390 [2d Dept 2020]; *Bong An v Villas-Familia*, *supra*). Specifically, defendants submitted medical evidence showing that none of the injuries alleged by plaintiff constitute a serious injury under either the permanent consequential limitation of use or the significant limitation of use categories of Insurance Law § 5102 (d) (see *Narvaez-Reyes v Palomino*, *supra*; *Bong An v Villas-Familia*, *supra*; *Jeehyun Choi v Joel*, 181 AD3d 660, 117 NYS3d 867 [2d Dept 2020]; *Nicholson v Kwarteng*, 180 AD3d 695, 115 NYS3d 707 [2d Dept 2020]). In her affirmed report, defendants' examining physician, Dr. Scarpinato, states that she reviewed, among other things, various of plaintiff's medical records and medical reports and that she performed an orthopedic examination of plaintiff on November 23, 2019. She further states that she measured the range of motion of plaintiff's cervical, thoracic and lumbar spine, right shoulder, right hip and right knee, and found that plaintiff had normal range of motion in those regions (see *Washington v County of Nassau*, 176 AD3d 903, 111 NYS3d 107 [2d Dept 2019]; *Gersbeck v Cheema*, 176 AD3d 684, 107 NYS3d 705 [2d Dept 2019]; *Moore v Burns*, 165 AD3d 1098, 85 NYS3d 197 [2d Dept 2018]). Dr. Scarpinato further states that she diagnosed plaintiff as having suffered strains to the cervical and lumbar spine, right shoulder, and right leg, all of which have since resolved, and that plaintiff had "no orthopedic disability, permanency or residuals" (see *Romero v Brathwaite*, 154 AD3d 894, 62 NYS3d 170 [2d Dept 2017]; *Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). Further, Dr. Scarpinato opines that diagnostic studies of plaintiff's cervical, thoracic, and lumbar spine demonstrated evidence of preexisting degenerative changes (see *Greenberg v Macagnone*, 126 AD3d 937, 7 NYS3d 185 [2d Dept 2015]; *Kabir v Vanderhost*, 105 AD3d 811, 962 NYS2d 703 [2d Dept 2013]; *Jilani v Palmer*, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]). Contrary to plaintiff's contention, defendants are permitted to rely upon unsworn medical reports and uncertified medical records prepared by plaintiff's treating medical providers to demonstrate the lack of serious injury (see *Uribe v Jimenez*, *supra*; *Elshaarawy v U-Haul Co. of Mississippi*, *supra*; *Panisse v Jrs. Truck Rental*, 239 AD2d 397, 662 NYS2d 768 [2d Dept 1997]). Defendants also established, *prima facie*, that plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d) by submitting excerpts of plaintiff's deposition testimony, which demonstrate that she missed approximately five weeks of work following the accident and then returned to her usual duties (see *Amato v Gorecik*, 167 AD3d 557, 86 NYS3d 905 [2d Dept 2018]; *Anderson v Foley*, 162 AD3d 965, 78 NYS3d 417 [2d Dept 2018]; *Heesook Choi v Mendez*, 161 AD3d 1054, 77 NYS3d 466 [2d Dept 2018]; *Dae Kyoo Kim v Lemon Transp. Corp.*, 156 AD3d 757, 67 NYS3d 266 [2d Dept 2017]).

The burden thus shifted to plaintiff to raise a triable issue of fact as to whether she had sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). In her opposition to defendants' motion, plaintiff has succeeded in doing so.

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As a threshold matter, and contrary to defendants' contention, office records containing a treating physician's day-to-day business entries qualify for admission as business records provided that the foundation requirements of CPLR 4518 (a) are satisfied (*see Daniels v Simon*, 99 A3d 658, 951 NYS2d 745 [2d Dept 2012]; *Bronstein-Becher v Becher*, 25 AD3d 796, 809 NYS2d 140 [2d Dept 2006]). The foundation requirements for the admissibility of a document as a business record "must be provided by someone with personal knowledge of the maker's business practices and procedures" (CPLR 4518 [a]; *GMAC Mtge., LLC v Yorke*, 175 AD3d 1498, 109 NYS3d 423 [2d Dept 2019]; *City Natl. Bank v Foundry Dev. Group, LLC*, 160 AD3d 920, 72 NYS3d 491 [2d Dept 2018]). Here, Louis Young and Jaclyn Bense attested to their familiarity with the record keeping practices and procedures of Michael J Errico MD PC and Kalter Physical Medicine (also referred to as "Kalter Physical Medicine & Rehabilitation"), respectively, and, thus, plaintiff has laid the proper foundation for the court to consider portions of her medical records containing her treating physicians' day-to-day business entries (*see* CPLR 4518 [a]; *City Natl. Bank v Foundry Dev. Group, LLC*, *supra*; *cf. GMAC Mtge., LLC v Yorke*, *supra*). Although those portions of plaintiff's medical records containing medical opinions or expert proof could not be admitted as business records under CPLR 4518 (*see Rickert v Diaz*, 112 AD3d 451, 976 NYS2d 80 [1st Dept 2013]; *Daniels v Simon*, *supra*), to the extent that Dr. Scarpinato in her affirmation referred to unaffirmed reports by plaintiff's treating physicians, plaintiff properly relied on those reports in opposition to the motion (*see Williams v Clark*, 54 AD3d 942, 864 NYS2d 493 [2d Dept 2008]; *Zarate v McDonald*, 31 AD3d 632, 819 NYS2d 288 [2d Dept 2006]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]; *cf. Cebron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

In his affirmed report, Dr. Kalter sets forth, among other things, quantitative findings of ongoing restrictions in the range of motion in plaintiff's cervical and lumbar spine<sup>1</sup> (*see Pommells v Perez*, NY3d 566, 797 NYS2d 380 [2005]; *Barry v Future Cab Corp.*, 71 AD3d 710, 896 NYS2d 423 [2d Dept 2010]). Dr. Kalter acknowledges that plaintiff had preexisting disc degeneration in her cervical and lumbar spine and finds that the accident caused "significant exacerbation" of those conditions<sup>2</sup>; that her "prognosis for a full and complete recovery of the cervical and lumbar spine is extremely poor, due to the extent of damage"; that the "severe residual inflammatory pathology to the muscular and supportive structures of [plaintiff's] cervical and lumbar spine . . . are permanent"; and that "the accident of July 17, 2018 was the direct component producing cause of Ms. Morseman's above noted injuries" (*compare Diaz-Montez v JEA Bus Co., Inc.*, 175 AD3d 1384, 1386 [2d Dept 2019]). As Dr. Kalter explains:

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1 Dr. Kalter notes that his follow up evaluation of plaintiff on April 20, 2020 and her most recent visit of May 19, 2020 were both conducted "via telemedicine because of the Covid-19 "situation."

2 In this respect, it should be noted that although defendants' examining physician, Dr. Scarpinato, observed, in her report, that "all diagnostic testing performed for the cervical, thoracic and lumbar spine revealed evidence of pre-existing degenerative changes," she did not suggest that plaintiff's physical complaints were attributable to those conditions and not to the effects of the accident. On the contrary, Dr. Scarpinato stated that "[t]he prior injuries had *no effect* on the injuries being alleged in this accident as the claimant's injuries are resolved" (emphasis supplied).

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The sudden violent and forceful impact caused by the accident exerted tremendous pressure to the structural integrity of the nucleus pulposus, annulus fibrosis and facet joints of the cervical and lumbar spine resulting in multiple lumbar disc bulges (L3-4 and L4-5), as well as cervical and lumbar spine radiculitis/spondylosis. As a result of [plaintiff's] cervical and lumbar spine injuries, she has suffered significant and continued neck and back pain with continued pain radiating to the right leg for which EMG/NCV study of the lower extremities was warranted and this test confirmed at right L5 lumbar radiculopathy. Lastly, range of motion testing revealed consistent pain and significant limitations in cervical and lumbar range of motion.

Furthermore, the trauma to the neck and low back caused by the accident resulted in post traumatic sprain/strain syndromes with [myofascial] derangements, secondary to ligaments and muscles being over-stretched, nerves being irritated and various soft tissues becoming inflamed.

These injuries are healing by way of scar tissue formation, which is less elastic and less functional than the original tissues they replaced. This serves to reduce joint motion, as well as results in the formation of fibrosis and lack of normal movement of the nerve root within the intervertebral foramen, thus causing subsequent irritation of the involved neural structures and resulting in pain and parasthesia. The above pathologies noted are clinically correlated with the patient's symptomatology, exam findings and physical limitations. . . .

Thus, plaintiff has provided competent medical evidence raising a triable issue of fact as to whether, as a result of the July 17, 2018 accident, she sustained a permanent consequential limitation of use or a significant limitation of use of a body function or system constituting a serious injury as defined by Insurance Law § 5102 (d) (see *Perl v Meher, supra*; *Gooden v Joseph*, 137 AD3d 1215, 27 NYS3d 393 [2d Dept 2016]). Accordingly, defendants' motion for summary judgment dismissing the complaint must be denied.

The foregoing constitutes the decision and order of the court.

Dated: December 27, 2020

  
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HON. SANFORD NEIL BERLAND, A.J.S.C.

       FINAL DISPOSITION        X   NON-FINAL DISPOSITION