Flor v Kiam
2020 NY Slip Op 35145(U)
October 14, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 607035/2018
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO.: 607035/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

ALEXANDER FLOR,

Plaintiff,

-against-

RAJHEEN KIAM,

Defendants.

ORIG. RETURN DATE: AUGUST 3, 2020
FINAL SUBMISSION DATE: SEPTEMBER 10, 2020
MTN. SEQ. #: 001
MOTION: MD

PLTF'S/PET'S ATTORNEY:
ZLOTOLOW & ASSOCIATES, PC
270 WEST MAIN STREET
SAYVILLE, NEW YORK 11782
631-564-0055

DEFT'S/RESP ATTORNEY:
BAKER, MCEVOY, MORRISSEY
& MOSKOWITZ, P.C.
1 METROTECH CENTER
BROOKLYN, NEW YORK 11201
212-857-8230

Upon the **E-file document list** numbered 8 to 24 read on the application of defendant for an Order, pursuant to CPLR 3212, granting defendant summary judgment dismissing the complaint of plaintiff for failure to meet the serious injury threshold requirement of Insurance Law § 5102 (d); it is

ORDERED that the motion by defendant for an Order, pursuant to CPLR 3212, granting defendant summary judgment and dismissing the complaint of plaintiff Alexander Flor, inasmuch as plaintiff, Alexander Flor, fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d), is hereby **DENIED** for the reasons set forth herein.

This is an action to recover damages for injuries allegedly sustained by plaintiff Alexander Flor ("Flor" or "plaintiff") as a result of a motor vehicle accident that occurred on May 13, 2017, on the eastbound side of the Belt Parkway, at or around its interchange with Springfield Boulevard, in the County of Queens, City and State of New York. Issue was joined on June 20, 2018. Plaintiff

alleges in his verified bill of particulars injuries to his thoracolumbar spine including segmental and somatic dysfunction, subluxation complex (vertebral), radiculopathy, radiculitis, intervertebral disc disorder, sciatica, lumbar facet disorder, lumbar facet effusion, sprain, strain of muscle, fascia and tendon of the lower back, sacral dysfunction, lumbalgia, lumbar derangement, discitis, disc disorder, straightening of the lumbar lordosis, bulging discs at L 1-2, L 2-3, L 3-4, L 4-5, and L5-S1 with lumbar anterior disc extensions and diminished disc space height. Plaintiff further alleges injuries to his cervical spine including sprain, strain, contusion, internal derangement, radiculitis, myositis, myofascitis, myalgia and radiculopathy, bulging discs at C 3-4, C 5-6 with bilateral foraminal disc herniations, and C 6-7 subligamentous disc bulging. Plaintiff further alleges injuries to his right ankle, including sprain, strain, contusion, internal derangement, intermediate to high-grade partial tear of the anterior talofibular ligament and calcaneal fibular ligament, tendinosis of the posterior tibial tendon, tendinosis of the peroneus brevis tendon, mild to moderate tibiotalar joint effusion and posterior subtalar joint effusion, preoperative diagnosis of right internal ankle derangement, torn anterior talofibular ligament and calcaneal fibular ligament, post operative diagnosis of right internal ankle derangement, torn anterior talofibular ligament, chondral interruption on tibial plafond, torn calcaneal fibular ligament, hypertrophied synovium, and soft tissue impingement, post-surgical scarring, post-traumatic arthritis, aggravation, activation and exacerbation of latent and quiescent cervical and lumbar DGD. Plaintiff further alleges these injuries are all permanent and progressive in nature. Plaintiff alleges that he was confined to his bed and home for three (3) days immediately following the accident, and confined to his home and out of work from November 24, 2017 through February 1, 2018.

Plaintiff's examination before trial was held on June 6, 2019. Plaintiff thereafter was examined by Dr. Darren Fitzpatrick ("Dr. Fitzpatrick"), radiologist, on December 20, 2018 and by Dr. Jesu Jacob ("Dr. Jacob"), orthopedic surgeon, on February 7, 2020 on behalf of defendant.

Defendant now moves for summary judgment dismissing the complaint on the grounds that plaintiff has not sustained a serious injury under any of the categories of injuries listed under Insurance Law § 5102 (d). In support of his motion, defendant submits an attorney affirmation, a copy of the pleadings, verified bill of particulars, the transcript of plaintiff's examination before trial, the affirmed reports of Dr. Fitzpatrick, and the affirmed report of Dr. Jacob. Plaintiff opposes the motion and submits an attorney affirmation, the affirmed reports of

Dr. Nazarali Visram, physiatrist ("Dr. Visram"), Dr. Steven M. Yager, podiatric surgeon ("Dr. Yager"), Dr. Marc Katzman, radiologist, Dr. Robert Diamond, radiologist, and Dr. Narayan B. Parachuri, radiologist, and plaintiff's hospital records.

Under New York law, there is no right of recovery for non-economic loss in an action arising out of negligence in the use or operation of a motor vehicle in the absence of evidentiary proof of a "serious injury" as that term is defined in Insurance Law § 5102 (d). It has long-been established that the legislative intent underlying the No-Fault Law, as codified in Article 51 of the Insurance Law, "was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). The determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of plaintiff's limitation or loss of range of motion must be provided or there must be 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 Sys.***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). In order to qualify under the 90/180-days category, an injury must be "medically determined" such that the condition must be substantiated by a physician and the condition must be causally related to the accident (*see* ***Damas v Valdes,*** 84 AD3d 87, 93, 921 NYS2d 114 [2d Dept 2011]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). A defendant can establish that a 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" (***Nunez v Teel,*** 162 AD3d 1058, 75 NYS3d 541 [2d Dept 2018]; *see also* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]; ***Moore v. Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v. Kamran***, 22 AD3d 458, 802NYS2d 706 [2d Dept 2005]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own expert witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's own physicians (*see* ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency

of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]; ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]).

Plaintiff testified at his deposition that his car was "totaled" in the accident and that he was taken by ambulance from the scene of the accident to Franklin General Hospital. Plaintiff testified that began treatment with Dr. Visram soon after and was referred for MRIs after expressing complaints to his neck, back and right ankle. He was diagnosed with torn ligaments in this right ankle and had surgery to repair the tears. He underwent physical therapy for months following the accident, and post-surgery, he walked in crutches for about six weeks and then a cane for another two months. Plaintiff testified that he never had any prior or subsequent injuries or treatment to his injured areas. Plaintiff further testified to difficulties performing every day activities such as tying his shoes, walking for long periods, going up stairs, and he can no longer run long distances, as he had done prior to the accident. He also testified he has difficulty exercising and is not able to go on vacation.

According to the affirmed report of Dr. Fitzpatrick dated December 20,2018, which defendant relies upon, the MRI of plaintiff's lumbar spine performed on July 2, 2017 reveals "multilevel small disc bulges with endplate productive changes" consistent with "mild, multilevel degenerative disc disease" not causally related to "acute traumatic lumbar spine injury." Further, Dr. Fitzpatrick reports that the MRI of plaintiff's cervical spine performed on June 14, 2017 reveals a "small syrinx at C6-C7 with posterior fossa cyst suggesting an herniated cerebellar tonsils through the foramen magnum suggesting Dandy-Walker syndrome and Chiari 1 malformation respectively." Dr. Fitzpatrick opines that this condition "is more likely than not congenital or developmental in nature" and not the result of a traumatic injury. As to plaintiff's right ankle, Dr. Fitzpatrick

reports that the review of the MRI performed on July 22, 2017 reveals an "unremarkable ankle MRI" and "no traumatic injury."

The affirmed report of Dr. Jacob, also relied upon by defendant, details his examination of plaintiff conducted on February 7, 2020. Dr. Jacob notes plaintiff is a 28-year-old, 6'1" tall and weighs 245 pounds. Upon physical examination, Dr. Jacob performed range of motion tests to plaintiff's cervical, thoracic, and lumbosacral spines, as measured by a goniometer, with normal range of motion based on AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. Specifically, Dr. Jacob reports range of motion tests reveal flexion of 40 degrees (50 degrees normal), extension to 40 degrees (60 degrees normal), right and left rotation to 70 degrees (80 degrees normal) and right and left lateral flexion to 30 degrees (45 degrees normal). Dr. Jacob further found the foraminal compression, spurling and traction tests were all negative and no spasm was elicited upon palpation. As to the plaintiff's thoracic spine, Dr. Jacob notes his examination revealed no tenderness, muscle spasm, and normal alignment. Dr. Jacob further reports range of motion tests reveal flexion to 45 degrees (45 degrees normal), extension to 0 degrees (0 degrees normal), right and left rotation to 30 degrees (30 degrees normal), and right and left lateral flexion to 45 degrees (45 degrees normal). Dr. Jacob reports the clonus and laguere's tests were negative. Regarding Dr. Jacob's examination of plaintiff's lumbosacral spine, he reports range of motion tests reveal flexion to 60 degrees (60 degrees normal), extension to 10 degrees (25 degrees normal) and right and left rotation to 25 degrees (25 degrees normal). Dr. Jacob further reported the forward flexion, straight leg raising, lasegue's test, kernig, and waddell's tests were negative. Upon examination of plaintiff's right ankle, Dr. Jacob reports range of motion tests reveal dorsiflexion to 10 degrees (20 degrees normal), palmar flexion to 30 degrees (40 degrees normal), eversion to 15 degrees (20 degrees normal) and inversion to 15 degrees (30 degrees normal). Dr. Jacob further noted multiple well-healed arthroscopic portals to plaintiff's right ankle. Dr. Jacob further reports the anterior drawer and thompson tests were negative. Based upon his examination, Dr. Jacob opines there is no objective findings of any permanent injury to the cervical, thoracic, and lumbar spines and that plaintiff's right ankle has healed following arthroscopic surgery. Dr. Jacob further opines that decreased ranges of motion are on a "voluntary basis" and "were not supported by the objective orthopedic examination findings."

Here, defendant's examining orthopedist reported significant limitations in ranges of motion to plaintiff's cervical spine, lumbosacral spine, and

right ankle yet concludes that they were voluntary and subjective. However, Dr. Jacobs fails to explain, with any objective medical evidence, the basis for his conclusion that the limitations were self-imposed (***Mercado v Mendoza***, 133 AD3d 833, 19 NYS3d 757 [2d Dept 2015]; ***Farrah v Pinos,*** 103 AD3d 831, 959 NYS2d 741 [2d Dept 2013]; ***Chung v Levy,*** 66 AD3d 946, 887 NYS2d 676 [2d Dept 2009]). Moreover, Dr. Jacob does not address the MRI studies or causation in his affirmed report. In addition, Dr. Fitzpatrick made findings of multilevel disc bulges with endplate productive changes to plaintiff's lumbar spine. While Dr. Fitzpatrick opines that the condition of plaintiff's lumbar spine is consistent with degenerative disc disease, he fails to offer an explanation as to how this would occur to this plaintiff who was only 25 years of age at the time of the accident (*see e.g.* ***Bianchi v Mason,*** 179 AD3d 567, 118 NYS3d 559 [1st Dept 2020]). Further, neither Dr. Fitzpatrick nor Dr. Jacob relate their findings to the 90/180 serious injury category for the period of time immediately following the accident (***Ballard v Cunneen,*** 76 AD3d 1037, 908 NYS2d 442 [2d Dept 2010]; ***Volpetti v Yoon Kap,*** 28 AD3d 750, 814 NYS2d 236 [2d Dept 2006]; *see also* ***Kapeleris v Riordan,*** 89 AD3d 903, 933 NYS2d 92 [2d Dept 2011]).

Based upon the above, defendant failed to meet his *prima facie* burden of establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Nash v MRC Recovery, Inc.,*** 172 AD3d 1213, 1215, 101 NYS3d 376, 378 [2d Dept 2019]; ***Nunez v Teel,*** 162 AD3d 1058, 75 NYS3d 541 [2d Dept 2018]; ***Ramos v Baig***, 145 AD3d 695, 41 NYS3d 902 [2d Dept 2016]; ***Cockburn v Neal***, 145 AD3d 660, 44 NYS3d 59 [2d Dept 2016]; ***Dean v Coffee-Dean***, 144 AD3d 1080, 41 NYS3d 750 [2d Dept 2016]; ***Mercado v Mendoza***, 133 AD3d 833, 19 NYS3d 757 [2d Dept 2015]; ***Quiceno v Mendoza,*** 72 AD3d 669, 897 NYS2d 643 [2d Dept 2010]). The affirmed reports of Dr. Fitzpatrick and Dr. Jacob fail to eliminate triable issues of fact as to whether plaintiff sustained a serious injury to his cervical and lumbar spines and right ankle under either the permanent consequential limitation of use or significant limitations of use categories under Insurance Law § 5102 (d) (*see* ***Greenidge v United Parcel Serv., Inc.***, 153 AD3d 905, 60 NYS3d 421 [2d Dept 2017]). Inasmuch as defendant failed to establish *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether plaintiff's opposing papers were sufficient to raise a triable issue of fact (*see* ***Cues v Tavarone***, 85 AD3d 846, 925 NYS2d 346 [2d Dept 2011]; ***Reynolds v Wai Sang Leng***, 78 AD3d 919, 911 NYS2d 431 [2d Dept 2010]; ***McMillan v Naparano,*** 61AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept

2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Notwithstanding, even had this Court ruled that defendant's burden had been met, plaintiff presented objective medical evidence sufficient to raise issues of fact to be resolved at trial (*see* ***Romano v Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Kalpakis v County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). In that regard, plaintiff submitted an August 27, 2020 affirmed report of his treating physiatrist, Dr. Visram, an August 25, 2020 affirmed report of his treating and operating podiatrist, Dr. Yager, an affirmation of radiologist, Dr. Marc Katzman dated July 21, 2020, which refers to his MRI examination and report of June 15, 2017, the affirmation of radiologist, Dr. Robert Diamond, referring to his MRI and examination report of July 2, 2017, and the affirmation of radiologist, Dr. Narayan Parachuri, as to his findings of the MRI examination of plaintiff's right ankle performed on July 22, 2017.

Dr. Visram's examination reports significant reduced ranges of motion in plaintiff's cervical and lumbar spines measured with a goniometer and his review of the MRIs revealed disc herniation and bulges. Dr. Visram opined that while plaintiff had some improvement during his months of treatment and physical therapy, further treatment would not improve his injuries, which were chronic and permanent in nature. Dr. Visram opined that these injuries were due to the motor vehicle accident on May 13, 2017. Dr. Visram further addressed the opinion that plaintiff's injuries were degenerative in nature. According to Dr. Visram, the MRI of the cervical spine showed a C5-6 disc herniation, a right C5 radiculopathy shown on EDX studies, and his examination revealed significant reduced ranges of motion. Dr. Visram opined that based upon these findings and the young age of plaintiff, the injuries to plaintiff's cervical spine were traumatically induced. Dr. Visram further reported that the MRI films revealed no degenerative conditions to the cervical or lumbar spine, or right ankle.

Dr. Yager performed surgery on plaintiff's right ankle to repair a completely torn anterior talofibular ligament and calcaneal fibular ligament. Dr. Yager opined that these injuries were traumatically induced and that the accident of May 13, 2017 produced a significant limitation and a permanent and consequential limitation in the use and function of plaintiff's right ankle. Dr. Yager further opined plaintiff was likely to have traumatic arthritis in his later years as a result of the accident. The reported injuries that plaintiff sustained, including a traumatic cervical disc herniation, confirmed by MRI films, and two torn ligaments to his right ankle, both with significant limitations in ranges of motion, are

sufficient to raise an issue of fact to be resolved at trial as to whether plaintiff sustained a serious injury under the permanent consequential and/or significant limitation of use categories of Insurance Law § 5102 (d) (*see* ***Gooden v Joseph***, 137 AD3d 1215, 27 NYS3d 393 [2d Dept 2016]; ***Romano v Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Khavosov v Castillo,*** 81 AD3d 903, 917 NYS2d 312 [2d Dept 2011]; ***Mahmood v Vicks,*** 81 AD3d 606, 915 NYS2d 637 [2d Dept 2011]; ***Compass v GAE Transp. Inc.,*** 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]; ***Evans v Pitt,*** 77 AD3d 611, 908 NYS2d 729 [2d Dept 2010]; ***Tai Ho Kang v Young Sun Cho,*** 74 AD3d 1328, 904 NYS2d 743 [2d Dept 2010]). Moreover, the conflicting medical opinions of the respective experts of the parties raise issues of credibility to be resolved by a jury at trial (*see* ***Romano v Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Kalpakis v County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). Further, Dr. Visram's conclusion that plaintiff's injuries to his spine were induced by a trauma and were not degenerative in nature, creates a question of fact regarding causation (*see* ***Fraser-Baptiste v New York City Transit Authority***, 81 AD3d 878, 917 NYS2d 670 [2d Dept 2011]; ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). As to the gap in treatment, plaintiff's treating physician opined that plaintiff had reached maximum medical improvement and any further treatment would be palliative. These are sufficient justifications for cessation or gaps in treatment (*see* ***Jules v Barbecho,*** 55 AD3d 548, 549, 866 NYS2d 214 [2d Dept 2008]).

Accordingly, for the reasons set forth above, defendant's motion for summary judgment dismissing plaintiff's complaint is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: October 14, 2020

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ **FINAL DISPOSITION**   __X__ **NON-FINAL DISPOSITION**