

**Parker v Niagara Frontier Transp. Auth.**

2021 NY Slip Op 33301(U)

August 19, 2021

Supreme Court, Erie County

Docket Number: Index No. 818566/2018

Judge: Timothy J. Walker

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SUPREME COURT  
STATE OF NEW YORK : COUNTY OF ERIE

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TOMMY PARKER,

Plaintiff,

vs.

**DECISION & ORDER**

Index No. 818566/2018

NIAGARA FRONTIER TRANSPORTATION  
AUTHORITY and LYDIA ABID,

Defendants.

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BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **CELLINO LAW, LLP**  
Stephen C. Ciocca, Esq., Of Counsel  
Attorneys for Plaintiff

**NIAGARA FRONTIER TRANSPORTATION AUTHORITY**  
John P. DePaolo, Esq., Of Counsel  
Attorneys for Defendants

**WALKER, J.**

This action for personal injuries arises out of a motor vehicle accident that occurred on September 7, 2018, on Pearl Street in the City of Buffalo, New York (the “Incident”), and the jury trial is scheduled to commence on September 13, 2021.

At the time of the Incident, Defendant, Lydia Abid, while employed by Defendant, Niagara Frontier Transportation Authority (“NFTA”), and working within the scope of her employment, operated an NFTA bus that rear-ended the vehicle being operated by Plaintiff.

Defendants have applied for an order striking Plaintiff's Second Supplemental Verified Bill of Particulars, dated July 19, 2021, and quashing a Judicial Subpoena and Subpoena Duces Tecum (Doc. 41; Motion 4). Plaintiff has applied for an order precluding Defendants' proposed medical expert, John J. Leddy, M.D., from offering expert testimony regarding the severity of impact and causation of Plaintiff's injuries; from rendering opinions in the field of engineering, accident reconstruction or biomechanics; and from rendering opinions in the field of spinal injuries or treatment; or in the alternative, to strike Defendants expert disclosure as insufficient; or in the alternative to conduct a *Frye* hearing to examine the qualifications and foundation of Dr. Leddy's proposed testimony (Doc. 51; Motion 5).

### **Defendants' Motions**

Plaintiff's First Supplemental Verified Bill of Particulars, dated April 14, 2020, states that as a result of the Incident, Plaintiff sustained the following injuries, among others:

Anterior cervical discectomy and fusion surgery at C3-4, C4-5 on March 10, 2020 as more fully described in the operative report provided under separate cover, the contents of which are incorporated by reference as if fully stated herein;

Surgical scar from cervical spine surgery;

Possible future surgery in the cervical spine at the levels above and below the fusion cite;

Recommendation for shoulder surgery, and the possibility such surgery may happen in the future (Doc. 45, pp1-2).

Plaintiff's Second Supplemental Verified Bill of Particulars, dated July 19, 2021, states that as a result of the Incident, Plaintiff sustained the following injuries, among others, in addition to the injuries identified in Plaintiff's First Supplemental Verified Bill of Particulars:

More probable than not that plaintiff will require subsequent surgical intervention at the adjacent levels at C5-6 and C6-7 throughout his lifetime;  
Further future treatment will include x-rays every 1-2 years, MRI studies every 5 years, and periodic physical therapy/chiropractic adjustments for flare ups;

More probable than not future surgery in the cervical spine at the levels above and below the fusion cite as mentioned above;

Recommendation for shoulder surgery, and as a result, it is more likely than not such shoulder surgery will occur in the future;

Surgical scarring from such shoulder surgery;

Significant limitations from such shoulder surgery; and

Sleep disturbances due to pain (Doc. 46, pp. 2-3).

With respect to the claimed spinal injuries, Plaintiff's First Supplemental Verified Bill of Particulars identified cervical discectomy and fusion surgery at certain levels and that future surgeries at such levels and adjacent levels was "possible." Plaintiff's Second Supplemental Verified Bill of Particulars merely indicates that such surgeries are "more probable than not," as opposed to "possible." Plaintiff's Second Supplemental Verified Bill of Particulars similarly merely amplifies the claimed shoulder injuries previously identified in Plaintiff's First Supplemental Verified Bill of Particulars.

Plaintiffs' Second Supplemental Verified Bill of Particulars "allege[s] continuing consequences of the injuries suffered and described in previous bills of particulars, rather than new and unrelated injuries, [and, therefore] the contested bill of particulars is a supplemental bill of particulars, rather than an amended bill of particulars" (*Sisemore v. Leffler*, 125 AD3d 1374, 1375 [4<sup>th</sup> Dept 2015] ["Here, plaintiffs' second supplemental bill of particulars alleged that

plaintiff may require surgery in the future, which could involve anterior C5-6 and C6-7 discectomy and fusion. In addition, plaintiffs alleged ‘future cumulative economic loss’ of between approximately \$1,299,555 and \$1,699,464. Plaintiffs had alleged in their prior bills of particulars that plaintiff may require surgery and that there would be a claim for future lost earnings. Thus, the portions of the second supplemental bill of particulars at issue were ‘an anticipated sequelae’ of the injuries and damages previously alleged and did not allege new claims”] [internal citations omitted]). Accordingly, Plaintiff’s Second Supplemental Verified Bill of Particulars does not run afoul of CPLR 3043(b), which permits a party to “serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than 30 days prior to trial.”

Turning to the motion to quash, the Judicial Subpoena and Subpoena Duces Tecum (collectively, “Subpoena”) (Doc. 49) seek copies of Ms. Abid’s employee file and training and testing materials utilized by the NFTA (“Disputed Documents”). Plaintiff never sought copies of the Disputed Documents during the course of discovery, despite that nothing precluded Plaintiff from previously doing so. The trial note of issue has been filed and Court Ordered discovery deadline has passed. Thus, Plaintiff is not entitled to demand the Disputed Documents by way of the Subpoena (*Matter of Terry D*, 81 NY2d 1042, 1044-1045 [1993] [“a subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence . . . [nor may] the procedural mechanism of a subpoena duces tecum [be used] to expand the discovery available under existing law”]; *see also, Mestel & Company, Inc. v. Smythe Masterson & Judd, Inc.*, 215 AD2d 329, 329-330 [1<sup>st</sup> Dept 1995] [“The record reveals that the trial court did not abuse its discretion in quashing two subpoenas duces tecum issued by plaintiff during trial,

where, as here, plaintiff improperly utilized the overbroad trial subpoenas as a discovery device and a fishing expedition to secure from defendant Smythe wide-ranging discovery that plaintiff's counsel had neglected to obtain in pretrial disclosure during the three years preceding trial"], citing *Matter of Terry*).

### **Plaintiff's Motion**

Plaintiff contends that Dr. Leddy does not possess the skill, knowledge, education, training, or experience necessary to opine on the forces Plaintiff experienced as a result of the Incident, or whether such forces lacked sufficient force to cause Plaintiff's injuries. Plaintiff further contends that Dr. Leddy, a medical doctor, seeks to impermissibly expand his opinion from medicine to engineering.

The court disagrees with Plaintiff's characterization and takes judicial notice of the fact that defense doctors who have performed independent medical examinations, like Dr. Leddy herein, routinely offer expert testimony at trial as to causation.

In addition to reviewing Plaintiff's medical records (including, *inter alia*, diagnostic studies) and the parties' respective deposition transcripts and physically examining Plaintiff, Dr. Leddy watched bus video and audio footage of the Incident, which allegedly shows a low-impact collision, minimal damage to Plaintiff's vehicle, and Plaintiff's behavior immediately thereafter. Based on the foregoing and with respect to Plaintiff's back/spinal complaints, Dr. Leddy ultimately concluded that Plaintiff's complaints are wholly attributable to degenerative conditions. He made similar observations and conclusions regarding Plaintiff's alleged shoulder injuries.

The is obligated to limit the scope of the proposed expert's testimony based on his or her actual expertise (*Capara v. Chrysler Corp.*, 52 NY2d 114 [1981]), and an expert is not permitted to testify based upon theory or speculation (*Clough v. Szymanski*, 26 Ad3d 894 [4<sup>th</sup> Dept 2006]). However, upon reviewing Dr. Leddy's curriculum vitae (Doc. 53), the court determines that he is qualified to render the disputed opinions and that they would not be based on theory or speculation (*Fallon v. Esposito*, 35 AD3d 1067 [3d Dept 2006] [defendant's expert, a neurologist, was permitted to opine that plaintiff's alleged back/spinal injuries, as a result of a low-impact vehicular collision, were the result of degenerative conditions]). Plaintiff's objections go to the weight of Dr. Leddy's proposed expert testimony, not to its admissibility.

In light of the foregoing, Plaintiff's request for alternative relief is denied.

Accordingly, it is hereby

**ORDERED**, that Defendants' application to strike Plaintiff's Second Supplemental Verified Bill of Particulars is denied; and is further

**ORDERED**, that Defendants' application to quash the Subpoena is granted; and it is further

**ORDERED**, that Plaintiff's application to preclude Dr. Leddy from offering expert testimony regarding, *inter alia*, the severity of impact and causation of Plaintiff's injuries, is denied; and it is further

**ORDERED**, that Plaintiff's application for alternative relief is denied.

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not

constitute notice of entry.

Dated: August 19, 2021  
Buffalo, New York



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**HON. TIMOTHY J. WALKER, J.C.C.**  
Acting Supreme Court Justice