

Levy v Machuca

2021 NY Slip Op 33393(U)

October 14, 2021

Supreme Court, Orange County

Docket Number: Index No. EF011738-2018

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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MELISSA LEVY,

Plaintiff,

- against -

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

ANDREINA S. MACHUCA,

Defendant.

-----X

Index No. EF011738-2018

Action No. 1

-----X

ANDREINA S. MACHUCA,

Plaintiff,

-against-

Index No. EF004196-2019

Action No. 2

MELISSA LEVY,

Defendant.

-----X

DECISION and ORDER

The following papers numbered 1 to 5 were read and considered on a motion by the Defendant Melissa Levy, pursuant to CPLR 3212, to dismiss the action under Index No. EF0004196-2019, on the ground that the Plaintiff therein did not suffer a serious injury within the meaning of the no-fault law.

Notice of Motion- Griesman Affirmation- Exhibits A-G	1-3
Opposition- Cambareri Affirmation- Exhibits 1-4	4-5

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is denied.

Introduction

Melissa Levy (hereinafter "Levy") commenced Action No. 1 against Andreina Machuca to recover damages allegedly arising from a motor vehicle accident.

Andreina Machuca (hereinafter "Machuca") commenced Action No. 2 against Levy to recover damages allegedly arising from the same accident.

The actions have been joined.

Levy moves to dismiss Action No. 2 on the ground that Machuca did not suffer a serious injury within the meaning of the no-fault law.

The motion is denied.

Factual/Procedural Background

The accident at issue occurred at the intersection of a service road and Meadow Hill Road in Newburgh, New York, at approximately 1:22 a.m. on Sunday, October 7, 2018. Levy was traveling north on the service road, and Machuca was traveling west on Meadow Hill Road. There was a stop sign in Levy's direction of travel. The front passenger's side of Machuca's vehicle made contact with the rear passenger's side of Levy's vehicle as it was leaving the intersection.

According to a police report of the accident:

Vehicle 1 [Levy's vehicle] was exiting the parking lot of the Newburgh Mall located at 1401 State Route 300 by way - of a service road which intersects to Meadow Hill Road. Vehicle 2 [Machuca's vehicle] was traveling West on Meadow Hill Road. Vehicle 1 failed to stop at a stop sign located at the intersection of the service road and Meadow Hill Road, and pulled directly in front of vehicle 2 causing an un-avoidable crash. The operator of vehicle 1 stated numerous times that she was at fault for the accident. The operator of vehicle 1 was transported to St Lukes Hospital due to a severe facial laceration .

In a prior decision dated May 12, 2021, the Court denied a motion by Machuca for summary judgment on the issue of liability. The Court found triable issues of fact as to the comparative fault of the parties.

In a bill of particulars, Muchaca complains, *inter alia*, of the following injuries.

RIGHT SHOULDER

TEAR OF THE ANTERIOR AND SUPERIOR LABRUM, ROTATOR CUFF TEAR, HYPERTROPHIC SYNOVITIS, IMPINGEMENT SYNDROME AND ADHESIONS REQUIRING SURGICAL INTERVENTION IN THE FORM OF COMPLETE SYNOVECTOMY, ARTHROSCOPIC MAJOR JOINT DEBRIDEMENT OF ANTERIOR AND SUPERIOR LABRUM, ROTATOR CUFF SUPRASPINATUS DEBRIDEMENT, LYSIS AND RESECTION OF ADHESION AND SUBACROMIAL DECOMPRESSION WITH ACROMIOPLASTY ON FEBRUARY 22, 2019;
RIGHT SHOULDER DERANGEMENT;
SLAP TEAR;
TEAR OF THE MID SUPRASPINATUS MUSCLE TENDON;
BICEPS TENOSYNOVITIS;
RIGHT ROTATOR CUFF SYNDROME;
RESTRICTED RANGE OF MOTION;
PARESTHESIA;
FUTURE DEVELOPMENT OF ARTHRITIS MAY OCCUR;
FUTURE SURGERY MAY BE REQUIRED WITH RESULTANT SCARRING;
LUMBAR DISC BULGING AT L3-L4, L5-S1 WITH NEUROFORAMINAL

NARROWING AND LATERAL STENOSIS;
RADICULOPATHY;
LUMBAR SPRAIN & STRAIN;
THORACIC SPINE SPRAIN & STRAIN;
LUMBAR PLEXOPATHY;
INTERVERTEBRAL DISC DISORDER WITH MYELOPATHY;
CERVICAL DISPLACEMENT;
CERVICALGIA;
CERVICAL PLEXOPATHY;
CERVICAL SPONDYLOSIS;
GREAT PAIN, ANXIETY, RESTLESSNESS AND NERVOUSNESS

Levy moves for summary judgment dismissing Action No. 2 on the ground that Muchaca did not suffer a serious injury within the meaning of the no-fault law.

In support of her motion, Levy submits an affirmed report from Ira Neustadt, M.D., a neurologist.

Dr. Neustadt examined Muchaca on September 22, 2020. Based on his examination, and his review of medical records, Dr. Neustadt found as follows.

Muchaca's past medical history included a back injury with a hairline fracture in the vertebral body in the lumbosacral region at age 10, when she injured herself jumping into a shallow pool.

Prior surgeries included arthroscopic right shoulder surgery on February 22, 2019, TEA as a child and a breast resection.

On January 10, 2019, Dr. Matthew Alan Wert, orthopedic surgeon, had diagnosed Muchaca with shoulder trauma, with a full-thickness rotator cuff and right shoulder labral tear.

Dr. Neustadt founding nothing abnormal during his neurological examination.

On a musculoskeleton examination, he found as follows.

There is no tenderness to palpation of the cranium, sinuses or orbits. There is no click of temporomandibular joints. Temporal arteries are normal to inspection to palpation. There are no signs of external head trauma. There is normal lordotic curve of both the cervical and lumbosacral spine. There is no evidence of any cervical, thoracic or lumbosacral spasm. There is no midline tenderness to the cervical thoracic or lumbosacral spine. There is no sciatic notch tenderness. There is negative straight leg raising to 90 degrees in the supine and sitting positions without any complaints of pain. There is no radicular-type pain whatsoever. There is mild subjective tenderness to deep palpation diffusely in the posterior paracervical area mainly on the right side and in the right upper scapular, mid scapular and iliolumbar regions. These are subjective symptoms without any objective correlation on neuro exam.

Measured by goniometer, utilizing normal range of motion as per American Medical Association Guidelines for Evaluation of Permanent Impairment, Fifth Edition, March 2002; cervical spine flexion is 0-50 degrees, normal 0-50 degrees; extension is 0-60 degrees, normal 0-60 degrees; lateral bending to the right is 0-45 degrees, normal 0-45 degrees and lateral bending to the left is 0-45 degrees, normal 0-45, degrees; lateral rotation to the right is 0-90 degrees, normal 0-80 degrees and lateral rotation to the left is 0-90 degrees, normal 0-80 degrees- On cervical maneuvers, there are no complaints of localized or radicular-type pain. Lumbar spine flexion is 0-90 degrees, normal 0-60 degrees; lumbar spine extension is 0-30 degrees, normal 0-25 degrees; lateral bending to the right is 0-25 degrees, normal 0-25 degrees and lateral bending to the left is 0-25 degrees, normal 0-25 degrees. On lumbar spine maneuvers, there is no complaint of pain whatsoever as well.

Dr. Neustadt concluded as follows.

IMPRESSION: This 27-year-old female was involved on 10/7/18 in a motor vehicle accident. She sustained right shoulder, neck and possible low back trauma. An MRI scan of the cervical and lumbar spine showed evidence of mild early degenerative disc disease. I cannot with any degree of medical certainty attribute this to the motor vehicle accident in question- I feel this represents mild findings, not unusual even in this age group. The right shoulder problems would be best addressed by the appropriate specialist. On neuro exam at the present time, I see no objective evidence of any significant structural, intracranial, myelopathic, radiculopathic or neuropathic dysfunction. On musculoskeletal

exam, there are no impressive findings as well.

The claimant has a diagnosis of cervical and lumbosacral strain patterns of pain. She has no evidence of any radicular type pain. In the absence of objective findings on neuro and musculoskeletal exams, they appear to be resolved.

The claimant has no history of any preexisting conditions other than a lumbar fracture that was treated conservatively at age ten from an injury in a shallow pool. In the absence of objective findings on neuro exam, I feel the claimant can perform all her activities of daily living and work.

In the absence of objective findings on neuro exam, I see no objective evidence of any neurological disability stemming from this accident. From a neurological point of view the claimant has an excellent prognosis.

(Motion, Exhibit F).

In further support of her motion, Levy submits an affirmed report from Dr. Robert C. Hendler, an orthopedist.

Based on his examination of Machuca on August 20, 2020, and his review of various medical record, Dr. Hendler states as follows.

Machuca presented with the chief complaints of neck, lower back and right shoulder problems.

On October 29, 2018, Machuca was seen by a Dr. Blumenthal at his clinic in Newburgh, New York. Diagnostic testing at his direction reported findings as follows:

- MRI of the cervical spine was done on 12/7/18, It showed multiple bulging discs, but no evidence of any herniation or posttraumatic findings were noted.
- MRI of the lumbar spine was also done on 12/7/18. It showed bulging discs in at least two levels. There was no evidence of any herniated discs or posttraumatic pathology noted.
- MRI of the right shoulder was done on 12/15/18. It showed productive changes of the acromioclavicular joint, a possible SLAP tear and findings consistent with a full thickness rotator cuff tear. (It is quite possible that this test was over-read as her clinical pattern in

the emergency room is completely inconsistent with having sustained an acute tear of the right rotator cuff at the time of the motor vehicle accident of 10/7/18.)

Her neck and back were treated with chiropractic, acupuncture and pain management by Dr. Gamburg, who administered trigger point injections on one occasion. He also discussed epidural steroid injections with her; however, these injections were not administered to her. She was also treated with some medication. This treatment was three (3) months in duration.

Subsequent to the above-mentioned MRI study of the right shoulder, she states she was referred to Dr. Wert, who also works in Dr. Blumenthal's legal accident clinic. She was initially evaluated by Dr. Wert on 1/10/19 for her orthopedic problems, including the right shoulder. After evaluating her Dr. Wert recommended further physical therapy, but eventually recommended surgery for her right shoulder. Dr. Wert subsequently performed an operative arthroscopy of the right shoulder on 2/22/19 at the New York Surgery Center in Queens, N.Y. I have reviewed his operative report, and he essentially performed a simple debridement, and did not do any significant surgery for any posttraumatic findings. I have also been provided with one (1) page containing seven (7) color intraoperative photographs taken at the time of this surgery, and my findings are as follows:

- Review of the images of the glenohumeral joint shows no evidence of any posttraumatic pathology.
- There are three (3) images apparently taken of the subacromial space showing that an apparent acromioplasty has been performed.
- There is no documentation of any rotator cuff tear, glenoid labrum tear or any other posttraumatic findings on the submitted images.

From my complete review of the above-noted operative report and intraoperative photographs there are no posttraumatic findings that would have caused the need for Dr. Wert's right shoulder surgical procedure. It also appears that the initial MRI study of the right shoulder was over-read in that there were no rotator cuff tears or SLAP lesions documented at the time of the operative arthroscopy that can be seen on the submitted color intraoperative photographs. She also relates that she had physical therapy both pre and postoperatively, which continued until the COVID-19 pandemic. She was receiving physical therapy 1-2 times a week. She is not under any active orthopedic care at this time, but reports that she will be seeing Dr. Blumenthal again in the near future. Other than what has been mentioned above, no other significant orthopedic treatment was rendered to Ms. Machuca subsequent to the accident of record.

The claimant is right-handed. At the time of the accident of record she was employed as a

waitress. She is currently out of work, but had returned to work three (3) months following the accident of record.

At the present time, with regard to her cervical spine, she complains of intermittent aches, pains and stiffness. She will also experience headaches. She reports no radiation of the neck pain into her arms. No present numbness, weakness or paresthesias are reported in the upper extremities.

With regard to her lower back, she complains of intermittent aches and pain, with no radiation of the pain into her legs. No numbness, weakness or paresthesias are reported in the lower extremities. Coughing and sneezing will accentuate her low back symptoms. Lying down will not relieve her symptoms.

With regard to her right shoulder, she feels the surgery was mildly helpful. She complains that she still has a fairly constant ache and pain in the shoulder. She does not complain of any decreased motion per se, but she reports that she has difficulty lifting her arm above shoulder height as it will cause pain. She feels her right arm is weak, which causes her to have difficulty in doing certain activities of daily living.

When asked if there were any further problems, the claimant had no other significant complaints to offer.

Upon entering the room and during the examination, the examinee was alert, well oriented and cooperative. HEIGHT was 5'8" and WEIGHT was 130 lbs.

On physical examination, the documented ranges of motion and measurements were assessed visually and with the use of a handheld goniometer, inclinometer and tape measure. Range of motion is a subjective finding under the voluntary control of the individual being tested. Variables, such as body habitus, age, conditioning, as well as the claimant's effort, may affect the observed results. The values of all the measurements were compared to the normal active range of motion values in accordance with the "Guidelines to the Evaluation of Permanent Impairment", 6th Edition, published by the American Medical Association.

Examination was performed of the cervical spine. Range of motion testing was determined by visual measurement. The following tests were used to determine range of motion. There was full range of motion of the cervical spine with normal values of flexion to 60 degrees, extension to 60 degrees, right rotation to 80 degrees, left rotation to 80 degrees, right lateral side bending to 45 degrees, and left lateral side bending to 45 degrees. No spasm of the cervical paravertebral musculature or atrophy of any of the muscle groups of the upper extremities was noted. All joints of the upper extremities had a full range of motion. Grip strength was 5+ and equal bilaterally. All motor groups tested in the upper extremities were 5+ and equal bilaterally. Neurologic examination revealed

the following: triceps jerk 2+, biceps jerk 1+ and brachial radialis 1+, and all were equal bilaterally. There was a normal sensory examination to pin prick testing. No pain was elicited on palpation of cervical spine area.

Physical examination of the lumbar spine was performed. On testing range of motion of the lumbar spine there were normal values in all directions as follows: 80 degrees flexion, 25 degrees extension, 25 degrees left and right lateral bending, and 30 degrees right and left thoracolumbar rotation. These normal values represent full range of motion of the lumbar spine.

There was no palpable spasm of the lumbar paravertebral musculature. No pain in either sciatic notch was evidenced on palpation.

Straight leg raising was found to be negative at 90 degrees bilaterally. Bragard's test was negative bilaterally. Deep tendon reflexes of the lower extremities revealed a normal active and equally symmetrical knee and ankle jerk. Extensor halluc longus muscle had a bilaterally equal strength of 5+. On testing of the muscle groups in the lower extremities, they were found to be 5+ and symmetrical without detection of any atrophy. No deficit to pin prick was elicited on sensory examination of the legs. She walked with a normal gait and stood on tiptoes and heels without difficulty.

Examination was performed of both shoulders. There were three, small, arthroscopic surgical scars present on the right shoulder. The following tests were used to determine range of motion. On testing range of motion actively and passively of the shoulders, the values were normal in all directions as follows: 180 degrees of abduction, 45 degrees of adduction, 50 degrees of extension, 180 degrees of flexion, 80 degrees of internal rotation and 80 degrees of external rotation. These normal values represent full range of motion of both shoulders. There was no atrophy of either shoulder girdle musculature. There were no palpable trigger zones or crepitus on range of motion of either shoulder. Hawkins, Neer and O'Brien's tests were negative bilaterally.

X-rays were taken in my office on 8/20/20 as follows:

Cervical Spine: X-ray findings show the overall alignment of the spine is essentially within normal limits. There is a normal cervical lordosis. There is no significant degenerative change. There is no evidence of any subluxations, fractures or dislocations. The disc spaces are well maintained.

Lumbosacral Spine: X-ray findings show the overall alignment of the spine to be within normal limits. No fractures or dislocations noted. There is the presence of a normal lumbar lordosis noted. There is no evidence of any spondylolisthesis or degenerative change. The disc spaces are well maintained.

Right Shoulder: X-ray findings show no evidence of any fractures or dislocations. The joint space is well maintained. There is no evidence of any periarticular soft tissue calcifications and the acromioclavicular joint is essentially anatomical.

From my history, physical examination, x-rays and review of the extensive submitted medical records, and if the history stated by Ms. Machuca is correct, it is my opinion that she may have sustained a cervical sprain and possibly a lumbar sprain.

Present physical examination and x-rays of her low back and neck are completely normal. There are no positive objective neurologic tests that would have any clinical correlation with a herniated disc in the neck or back, or a cervical or lumbar radiculopathy, including absent or asymmetric reflex, decreased sensation in a dermatomal type pattern or other positive objective neurologic tests. Based on a normal physical examination and x-rays, there is no present disability, and she will have no permanent findings in her neck or low back that would be causally related to the accident of record.

With regard to her right shoulder, she does give a mechanism for sustaining a simple contusion. There was certainly no mechanism of injury for sustaining an acute tear of the rotator cuff. Her clinical pattern is such that it seems extremely unlikely that she sustained an acute rotator cuff tear. Certainly if her rotator cuff had been torn, she would have had symptoms and pain in the shoulder, and would not have had the full range of motion of her shoulder as was reported by the emergency room physician. It is quite possible that the MRI study of the right shoulder was over-read. From my review of the submitted intraoperative color photographs, there was no documentation of any posttraumatic findings that would have necessitated the operative arthroscopy of the right shoulder. It is, therefore, my opinion that the need for the surgical procedure performed by Dr. Wert is not causally related to the motor vehicle accident of 10/7/18. Based on my physical examination, she will not have any permanent functional loss of use of her right shoulder that would be causally related to the accident of record.

The overall prognosis for her neck, back and right shoulder is considered good. She is able to work and perform all her usual activities of daily living.

(Motion, Exhibit G).

In opposition to the motion, Machuca submits an affirmation from Matthew Wert, M.D., an orthopedist.

Dr. Wert examined Muchaca on February 25, 2021.

Based on his examination, and his review of medical records, Dr. Wert concluded as

follows.

Machuca reported to of his office with the following chief complaints:

1. Right shoulder pain.
2. Cervical spine pain.
3. Lumbar spine pain.

Following the accident, Machuca began conservative treatment consisting of physical therapy, chiropractic treatment, acupuncture, medication, and rest for her right shoulder pain.

On January 10, 2019, she presented to his office complaining of severe consistent right shoulder pain. An MRI of the right shoulder on December 15, 2018, revealed a full thickness rotator cuff tear as well as a labral/SLAP tear. It was recommended that she continue with conservative treatment. When extensive conservative treatment for her right shoulder pain, failed, Machuca underwent a right shoulder arthroscopy on February 22,2019.

On February 25, 2021, she presented to his office for an orthopedic evaluation. Despite a right shoulder arthroscopy and extensive conservative treatment, including physical therapy, chiropractic treatment, acupuncture, anti-inflammatory agents, analgesics, and rest, she continued to experience consistent right shoulder pain.

Upon physical examination, he found the following measurements using a goniometer.

Right Shoulder: Range of Motion:

With pain, flexion 140 degrees [normal-180], abduction 140 degrees [normal-180], internal rotation 45 degrees [normal-90], external rotation 70 degrees [normal-90]

Pain and Tenderness present.

Hawkin's Test positive.

Jobe's Test positive.

Apprehension Sign negative.

Drop Sign Test positive.

Supraspinatus Test positive.

Subscapularis Test negative.

O'Brien's Test positive.

Crank Test positive.

Impingement Test positive.

Rotator Cuff Test is positive.

Speeds Test positive.

Yergason's Test positive.

Right Shoulder: Muscles and soft tissues includes the deltoid, rotator cuff tendon insertion /greater tuberosity, trapezius, and biceps tendon in groove.

Range of Motion (ACTIVE):

Flexion (normal 180 degrees) 160

Extension (normal 60 degrees) 50

Adduction (normal 30 degrees) 25

Abductiuon (normal 180 degrees) 170

Internal rotation (normal 70 degrees) 60

External rotation (normal 90 degrees) 80

Internal rotation to vertebral height (T4-T8 considered normal) Sensation- intact.

Motor Strength- biceps, triceps, wrist extension, wrist flexion, and hand intrinsic 5/5.
Vascular capillary refill brisk.

- + Impingement
- + Neer Impingement sign
- + Hawkin's Test

Diagnostic Testing

1. MRI Right Shoulder 12/15/08

- a. Mild productive changes of the AC joint.
- b. Fluid in the glenohumeraljoint, and labral/SLAP tear are likely.
- c. Tear of the mid supraspinatus muscle/tendon complex consistent with a full thickness rotator cuff tear.
- d. Bicepstenosynovitis.
- e. Small anterior effusion.

1. Right shoulder s/p arthroscopy 02/22/2019

* * *

Conclusion:

The impact caused by the accident of October 7, 2018 exerted insult to the structural integrity of Ms. Machuca's right shoulder resulting in the above noted injuries. In addition, range of motion testing revealed significant limitations in right shoulder range of motion.

Furthermore, the trauma to the right shoulder resulted in post-traumatic sprain/strain syndromes with myofascial derangements, secondary to ligaments and muscles being over-stretched, nerves being initated 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 will serve to reduce motion, secondary to the formation of fibrosis.

These pathologies are clinically correlated with Ms. Machuca's symptoms, exam findings and physical limitations. The above objective findings help to explain the ongoing pain and physical impairments related to Ms. Machuca's right shoulder. Absence of any prior injury or treatment to the right shoulder explains that this injury did not pre-exist the

above noted accident. Her right shoulder injuries visualized on her pre-operative MRI were confirmed during her surgical care. Despite an intensive treatment program with different modalities and restriction before being examined by a surgeon, no full recovery has been noted, and Ms. Machuca continues to demonstrate signs and symptoms of residual inflammatory pathology to the muscular and supportive structures of the right shoulder at her most recent visit with me. The changes to the right shoulder are permanent in nature and physical stress will trigger recurrent episodes of right shoulder related pain and dysfunction.

Ms. Machuca is prone to future exacerbations of her symptom complex, thus contributing to ongoing pain. Considering her ongoing pain, young age, and symptomatic injuries, she remains a candidate for aggressive treatment modalities, including additional interventional pain management procedures. Ms. Machuca's disability is partial, permanent and has resulted in chronic pain with progressive remission and exacerbation during overuse of the right shoulder.

Ms. Machuca will continue to experience pain and limitation of her activities. The prognosis for a full and complete anatomic recovery of the right shoulder is poor. Based upon the history given by Ms. Machuca and the above objective findings, including signs on physical examination, objective testing and decreased range of motion, it may be stated with a reasonable degree of medical certainty that the accident of October 7, 2018 was the direct component producing cause of Ms. Machuca's above noted injuries.

(Opposition, Exhibit 1).

Discussion/Legal Analysis

Under New York's No-Fault regulatory scheme, a party may commence an action to recover non-economic loss only in the event of a "serious injury," which is defined as:

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.

Insurance Law § 5102(d). The legislative intent underlying the No-Fault Law is to weed out frivolous claims and limit recovery to significant injuries. As such, the courts have required

objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Subjective complaints of pain and limitations will not suffice unless supported by competent, admissible medical evidence, based on a recent examination and objective findings, that such subjective complaints of pain and limitation have a medical basis. *Perl v. Meher*, 18 N.Y.3d 208 (2011); *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 (2002); *Oliva v Gross*, 29 AD3d 551 [2nd Dept. 2006].

The “permanent loss” category requires proof of the loss of use of an organ, member, system or function that is total as well as permanent. It is not sufficient that the organ, member, system or function operates in some limited way. *Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295 (2001).

The “permanent consequential limitation” category requires proof that the body organ or member does not operate at all, or operates only in some limited way. It is not necessary to find that there has been a total loss of the use, but the limitation of use must be consequential, which means that it is significant, important or of consequence. A minor, mild or slight limitation of use is not significant, important or of consequence. *Decker v. Rassaert*, 131 A.D.2d 626 [2nd Dept. 1987].

The “significant limitation” category requires proof that a body function or system does not operate at all or operates only in some limited way. It is not necessary there has been a total loss or that the limitation of use is permanent. However, the limitation of use must be significant, meaning that the loss is important or meaningful. A minor, mild or slight limitation of use is not significant. *Licari v. Elliott*, 57 N.Y.2d 230 (1982); *Estrella v. Geico Ins. Co.*, 102 A.D.3d 730 [2nd Dept. 2013].

Whether a limitation of use or function is “significant” or “consequential” (*i.e.*, important) for purposes of the No-Fault Law relates to medical significance, and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Some injuries can be so minor, mild or slight as to be considered insignificant within the meaning of the No-Fault Law. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

The 90/180 day category requires proof of a medically determined injury or impairment of a non-permanent nature that prevented a plaintiff from performing substantially all of the material acts that constituted his or her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident. A medically determined injury is one that is supported by testimony by an appropriate medical professional. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

A "significant limitation" need not be permanent in order to constitute a serious injury. *Estrella v. Geico Ins. Co.*, 102 A.D.3d 730 [2nd Dept. 2013]. Thus, any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation. *Estrella v. Geico Ins. Co.*, 102 A.D.3d 730 [2nd Dept. 2013].

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. *Perl v. Meher*, 18 N.Y.3d 208 (2011). This is shown by comparing a measured range of

motion against the “normal” range of motion. *Delp v. Guerra*, 173 A.D.3d 681 [2nd Dept. 2019].

Typically, limitations of motion are demonstrated by expert testimony by an appropriate medical professional setting forth the tests conducted, and the ranges of motion found as compared to the norms. *Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept. 2009].

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. *Perl v. Meher*, 18 N.Y.3d 208 (2011). The tests used must have an objective basis. They cannot be simply a recording of the patients' subjective complaints. *Perl v. Meher*, 18 N.Y.3d 208 (2011).

A plaintiff need not necessarily demonstrate evidence of a restricted range of motion contemporaneous to the accident at issue. However, such evidence may be important to proving causation. *Perl v. Meher*, 18 N.Y.3d 208, 960 N.E.2d 424 (2011). Where causation is proved, the severity of the injuries may be measured at a later time. Indeed, injuries can become significantly more or less severe as time passes. *Perl v. Meher*, 18 N.Y.3d 208, 960 N.E.2d 424 (2011). Finally, the burden as to causation is not met with evidence of a preexisting degenerative condition causing plaintiff's alleged injuries. *Perl v. Meher*, 18 N.Y.3d 208, 960 N.E.2d 424 (2011).

A defendant moving for summary judgment must demonstrate, *prima facie*, that the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345; *Paul v. Weatherwax*, 146 A.D.3d 792 [2nd Dept. 2017].

The movant need only address those categories of injuries alleged in the bill of

particulars. *Silan v. Sylvester*, 122 A.D.3d 713 [2nd Dept. 2014].

Here, Machuca concedes that she has no claims under any permanent loss of use category of injury.

However, she notes, she does make claims under the "significant limitation" category of injury, to wit: that, as a result of the subject accident, she suffered a tear of the mid supraspinatus muscle/tendon, SLAP tear, biceps tenosynovitis and anterior effusion in her right shoulder; bulging lumbar discs at L3-L4 and L5-S1 with radiculopathy; and bulging cervical discs at C2-C3 and C5-C6 with radiculopathy.

Here, Levy made a prima facie showing that Muchaca did not suffer any permanent consequential limitation or significant limitations of use in her shoulder or spine by submitting the affirmed reports of experts who found no limitations in those body parts, and who concluded that Machuca's cervical and lumbar spine injuries were degenerative, and not causally related to the accident. *Corporan v. Erichsen*, 148 A.D.3d 549 [1st Dept. 2017].

However, in opposition, Machuca raised triable issues of fact with the affirmed report of her expert which found that she suffered injuries to her shoulder and spine in the accident which resulted in measured, permanent limitations of motion. *Bonilla v. Vargas-Nunez*, 147 A.D.3d 461 [1st Dept. 2017]; *Bernier v. Torres*, 79 A.D.3d 776 [2nd Dept. 2010]; *Byrd v. Limo*, 61 A.D.3d 801 [2nd Dept. 2009].

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is denied; and it is further,

ORDERED, that the parties, through respective counsel, are directed to, and shall, appear for a Status Conference on Wednesday, December 1, 2021, at 9:30 a.m. at the Orange

County Court House, Court Room #3, 285 Main Street, Goshen, New York, if the Courts are in session and not open to the public at that time; if courts are not open to then public then a virtual status conference will conducted on that date at a time to be designated by the Court.

The foregoing constitutes the decision and order of the court.

Dated: October 14, 2021
Goshen, New York

ENTER



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