

**Mondello v Price**

2021 NY Slip Op 33396(U)

March 17, 2021

Supreme Court, Orange County

Docket Number: Index No. EF005303-2019

Judge: Catherine M. Bartlett

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

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
GEORGE L. MONDELLO,

Plaintiff,

-against-

RICHARD H. PRICE JR., WHEELS INC. and NEW
YORK STATE ELECTRIC AND GAS CORPORATION,

Defendants.

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.

Index No. EF005303-2019

Motion Date: February 15, 2021

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The following papers numbered 1 to 8 were read on the Plaintiff's motion for partial
summary judgment on liability and Defendants' cross-motion for summary judgment based
upon the absence of "serious injury" as defined by Insurance Law §5102(d):

Notice of Motion - Affirmation / Exhibits . . . . . 1-2
Notice of Cross Motion - Affirmation / Exhibits - Physician Affirmation . . . . . 3-5
Affirmation in Opposition / Exhibits - Physician Affirmation . . . . . 6-7
Reply Affirmation . . . . . 8

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

This is a personal injury action arising out of an accident that occurred at about 2:00 p.m.
on June 19, 2018 at the intersection of State Route 17A and Quarry Road in the Town of Goshen,
New York. Route 17A, at this intersection, is a through highway with one lane in each direction.

Quarry Road is governed at the intersection by a stop sign. Plaintiff George L. Mondello was traveling northbound on Route 17A at a speed of approximately 25 miles per hour. Defendant Richard H. Price Jr. was traveling eastbound on Quarry Road, stopped at the stop sign, and then turned left onto Route 17A, whereupon the front passenger side of his vehicle struck the rear driver's side of Mr. Mondello's vehicle. Plaintiff claims that as a result of the accident he sustained an exacerbation of pre-existing conditions of his right knee and lumbar spine.

Plaintiff moves for partial summary judgment on the ground that Defendant was negligent as a matter of law in failing to yield the right of way to Plaintiff's vehicle in violation of VTL §§ 1172(a) and 1142(a). Defendants cross move for summary judgment, asserting that the June 2018 accident resulted only in minor injury superimposed upon Plaintiff's acknowledged pre-existing conditions, and that he sustained no "serious injury" causally related to that accident within the meaning of Insurance Law §5102(d). For the reasons set forth hereinbelow, the Defendants' motion is granted and Plaintiff's motion denied as moot.

#### **A. Governing Law**

The No-Fault Law precludes recovery for pain and suffering and other non-monetary detriment unless the plaintiff sustained a "serious injury" causally related to the motor vehicle accident at issue. Insurance Law §5104(a). While the plaintiff ultimately bears the burden of proof of serious injury, the defendant, as 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 eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985).

An aggravation of a pre-existing condition or injury may constitute “serious injury” per Insurance Law §5102(d). Nevertheless, the defendant may establish *prima facie* entitlement to summary judgment by presenting “persuasive evidence that plaintiff’s alleged pain and injuries were related to a preexisting condition” (*Pommells v. Perez*, 4 NY3d 566, 580 [2005]), and “were not caused or exacerbated by the subject accident.” *Sanclemente v. MTA Bus Co.*, 116 AD3d 688, 688-689 (2d Dept. 2014). *See, Little v. Ajah*, 97 AD3d 801, 802 (2d Dept. 2012); *Rodgers v. Duffy*, 95 AD3d 864, 866 (2d Dept. 2012); *Edouazin v. Champlain*, 89 AD3d 92, 894-895 (2d Dept. 2011); *Pero v. Transervice Logistics, Inc.*, 83 AD3d 681, 683 (2d Dept. 2011); *Rabinowitz v. Kahl*, 78 AD3d 678 (2d Dept. 2010); *Catania v. Hussain*, 78 AD3d 639 (2d Dept. 2010); *McKenzie v. Redl*, 47 AD3d 775, 776-777 (2d Dept. 2008). Where the defendant has demonstrated *prima facie* that the plaintiff’s condition was not caused or exacerbated by the subject accident, the plaintiff must, to survive summary judgment, “explain, in a specific and nonconclusory manner, how the subject accident exacerbated the plaintiff’s pre-existing condition.” *Inzalaco v. Consalvo*, 115 AD3d 8077, 808-809 (2d Dept. 2014). *See also, Boroszko v. Zylinski*, 140 AD3d 1742, 1743-45 (4<sup>th</sup> Dept. 2016); *Kendig v. Kendig*, 115 AD3d 438, 439 (1<sup>st</sup> Dept. 2014); *Nova v. Fontanez*, 112 AD3d 435, 436 (1<sup>st</sup> Dept. 2013).

Even if objective medical proof of injury exists, the chain of causation between the accident and the claimed injury may be broken by, e.g., “a gap in treatment, an intervening medical problem or a pre-existing condition.” *Pommells v. Perez, supra*, 4 NY3d at 572.

Where the defendant has presented persuasive expert medical evidence that the plaintiff’s alleged pain and injuries were related to a pre-existing condition or to a prior or subsequent accident, the plaintiff must address the defense expert’s findings and present competent, non-

conclusory expert evidence that the claimed injury was proximately caused by the accident at issue, and not by a different accident or by a pre-existing condition. *See, e.g., Pommells v. Perez, supra*, 4 NY3d at 580; *John v. Linden*, 124 AD3d 598, 599 (2d Dept. 2015); *Henry v. Hartley*, 119 AD3d 528, 529 (2d Dept. 2014); *Il Chung Lim v. Chrabaszcz*, 95 AD3d 950, 951 (2d Dept. 2012); *Chery v. Jones*, 62 AD3d 742, 742-743 (2d Dept. 2009). In such circumstances, the plaintiff's physician's failure to address prior accidents and/or pre-existing conditions affecting the same area of the body renders his conclusions regarding causation speculative and insufficient to raise a triable issue of fact. *See, Devito v. Anatra*, 189 AD3d 1175, 1176 (2d Dept. 2020); *Gash v. Miller*, 177 AD3d 950 (2d Dept. 2019); *Varveris v. Franco*, 71 AD3d 1128, 1129 (2d Dept. 2010); *Maffei v. Santiago*, 63 AD3d 1011, 1012 (2d Dept. 2009); *Jules v. Calderon*, 62 AD3d 958 (2d Dept. 2009); *Joseph v. A and H Livery*, 58 AD3d 688, 688-689 (2d Dept. 2009); *Sapienza v. Ruggiero*, 57 AD3d 643, 644 (2d Dept. 2008); *Tudisco v. James*, 28 AD3d 536, 537 (2d Dept. 2006); *Bennett v. Genas*, 27 AD3d 601, 601-602 (2d Dept. 2006); *Barnes v. Cisneros*, 15 AD3d 514, 515 (2d Dept. 2005).

Finally, in *Pommells v. Perez*, 4 NY3d 566 (2005), the Court of Appeals observed that a gap in treatment may “interrupt the chain of causation between the accident and claimed injury” such that summary dismissal of the complaint may be appropriate. *Id.*, at 572. The Court proceeded to hold that “[w]hile a cessation of treatment is not dispositive – the law surely does not require a record of needless treatment in order to survive summary judgment – a plaintiff who terminates therapeutic measures following the accident, while claiming ‘serious injury,’ must offer some reasonable explanation for having done so.” *Id.*, at 574 (summary judgment proper where no explanation for cessation of treatment six months after the accident was provided).

The question here is whether Plaintiff sustained a permanent consequential limitation, or significant limitation of use, of his right knee and/or his lumbar spine that is causally related to the June 19, 2018 motor vehicle accident.<sup>1</sup>

**B. Pertinent Facts**

**1. Pre-existing Condition of the Right Knee**

Plaintiff, 73 years of age at the time of the accident, had longstanding pre-existing conditions of his right knee. He underwent surgery to his right knee in 1976, and reinjured the knee in a fall on September 17, 2017, prior to the June 2018 motor vehicle accident at issue here. Per the radiologist's report, a post-accident MRI taken on July 25, 2018 (ca. five weeks post-accident) revealed pre-existing conditions and degenerative changes, but no evidence of traumatically induced injury:

- "Old tears of the medial collateral ligament and anterior cruciate ligament."
- "Torn anterior and posterior horns of medial meniscus which appears chronic in nature."
- "Chondral degeneration and degenerative subchondral osseous contusions..."
- "Marked osteoarthritic changes noted in medial compartment which is correlated with chondral degeneration, osseous contusions and meniscal disruption. Mild degenerative changes noted in the femorpatellar articulation and in the lateral compartment."
- "Large joint effusion." [i.e., water on the knee]

Examination on July 25, 2018 revealed good active range of motion of the right knee (to 125°).

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<sup>1</sup>Plaintiff has conceded on all other Insurance Law §5102(d) "serious injury" threshold categories except for his claim that he suffered economic losses in excess of "basis economic loss" within the meaning of Insurance Law §§ 5102 and 5104. However, as Defendants point out, this claim is fatally undermined by Plaintiff's own bill of particulars and deposition testimony, and Plaintiff has raised no triable issue of fact on that score.

## 2. Pre-existing Condition of the Lumbar Spine

Plaintiff also had longstanding pre-existing conditions of his lumbar spine, going back to compressed discs in the 1970's. His medical records reflect an episode of low back pain in July of 2015. An x-ray of the lumbar spine taken on June 26, 2018 (one week post-accident) revealed a "large right lateral spur bridging the L2 and L3 vertebral bodies," but "no evidence of acute lumbar spine fracture."

## 3. Treatment

As a result of the June 19, 2018 motor vehicle accident, Plaintiff missed four (4) days from work. His shift was reduced from six hours to four hours in consequence of back pain. He attended physical therapy for approximately nine (9) months, from July 2018 to March 2019. Much of the therapy was devoted to Plaintiff's cervical and thoracic spine, concerning which he herein alleges no injury. The physical therapy / chiropractic records reflect consistent improvement in range of motion of the lumbar spine. Plaintiff declined proffered cortisone injections, and after March 2019 he ceased therapy and had no plans for any further treatment. On April 8, 2019, he fell and bruised his tailbone.

## 4. Defense IME

Dr. Robert C. Hendler examined Plaintiff on July 14, 2020. His report states *inter alia*:

Examination was performed of both knees. On inspection there was a 6", medial, curvilinear incisional scar present on the right knee, likely secondary to a ligament reconstruction...There was mild genu varum of his right knee noted. Range of motion of the left knee was full with normal values of 0-140 degrees, and 0-135 degrees of the right knee. The right knee showed significant laxity to valgus stress testing. Anterior and posterior drawer and Lachman's tests were equivocal bilaterally. There was no effusion or atrophy of either thigh or calf musculature. There was a negative McMurray's test bilaterally. There was no pain on palpation of either patella. There was no crepitus on range of motion. He walked with a normal gait.

Physical examination of the lumbar spine was performed. The following tests were used to determine range of motion of the lumbar spine in all directions with normal values being 80 degrees flexion, 25 degrees extension, 25 degrees left and right lateral bending, and 45 degrees right and left thoracolumbar rotation. There was no muscle spasm noted paravertebrally. Deep tendon reflexes of the lower extremities revealed the ankle jerk to be normal active and equal bilaterally and the knee jerk to be normal active and equally symmetrical. Straight leg raising on both legs was negative at 90 degrees. The Bragard's test was bilaterally negative and there was no pain on palpation of the sciatic notches. The extensor hallucis muscle was equal bilaterally with a strength of 5+. There was no detectable atrophy noted of the muscle groups in the lower extremities and they were 5+ and symmetrical in all groups. On walking, he exhibited an unremarkable gait, and was able to stand on tiptoes and heels with complete facility. Sensory examination bilaterally to pin prick revealed no deficit in the legs.

X-rays were taken in my office on 7/14/20 as follows:

Lumbar Spine: X-ray findings show the presence of a normal lumbar lordosis. There is mild degenerative change seen throughout the lumbar spine area. There is significant calcification of the abdominal aorta. The disc spaces are fairly well maintained. There is no evidence of any spondylolisthesis.

Right and Left Knee: X-rays with AP weight bearing views show significant arthritic change in the right knee, mostly in the medial joint compartment. There are no soft tissue calcifications noted. Comparison views of the left knee show no significant degenerative change.

From my physical examination, x-rays and review of the extensive submitted medical records, as well as films on CDs, and if the history stated by Mr. Mondello is correct, it is my opinion that at the time of the accident of record he may have sustained a mild sprain or contusion to the right knee, with temporary exacerbation of a pre-existing significant right knee problem. He also may have sustained a mild sprain of his low back.

At this time there is still some residual ligamentous laxity in his right knee, which is secondary to a chronic knee condition that was not caused by the accident of record. Based on my record review and present physical examination, he is essentially status quo ante with regard to his right knee. The contusion or minor sprain sustained at the time of the accident of record has completely resolved. He will have no permanent findings in his right knee that would be causally related to the 6/19/18 accident of record.

With regard to his low back, the sprain sustained at the time of the accident of record has resolved. Present physical examination is normal in that there are no positive focal neurologic findings, such as a neurologic deficit, asymmetric reflex or decreased sensation in a dermatomal type pattern, that would clinically correlate with a herniated

disc in the low back or a lumbar radiculopathy. Based on my physical examination, there is no present disability, and he will have no permanent findings in his lumbar spine that would be causally related to the 6/19/18 accident of record.

No further causally related orthopedic treatment is indicated for his right knee or lumbar spine. The prognosis is considered good.

(See, Hendler IME Report).

Defendants thereby established *prima facie* that Plaintiff suffers from no permanent consequential limitation, or significant limitation of use, of his right knee and/or his lumbar spine that is causally related to the June 19, 2018 motor vehicle accident.

#### **5. Plaintiff's Expert**

Plaintiff was examined by Gabriel L. Dassa, D.O. on June 30, 2020, and proffers Dr. Dassa's orthopaedic evaluation report of that same date (i.e., two weeks *prior* to Dr. Hendler's report). Dr. Dassa acknowledged the existence of Plaintiff's pre-existing right knee condition, and diagnosed a "sprain/strain superimposed on preexisting degenerative change with osteoarthritis." There was no mention of pre-existing lumbar spine issues, and the diagnosis was "musculoligamentous injury" with radiculopathy.

On examination of the right knee, Dr. Dassa found a reduced ROM of 100 degrees flexion (normal 140 degrees), swelling, atrophy, diffuse tenderness over the medial meniscus, crepitus with palpation, and positive McMurray's and Apley's compression tests. On examination of the lumbar spine, Dr. Dassa found a reduced ROM in flexion (45 degrees, 90 degrees normal), extension (25 degrees, 30 degrees normal), lateral bending (20 degrees, 40 degrees normal), and lateral rotation (10 degrees, 30 degrees normal). Dr. Dassa concluded:

The patient was injured on [June 19, 2018] and sustained injury to the lower back and right knee. The patient's symptoms and clinical findings are consistent with the above

diagnosis and were directly caused by the accident. The patient presents today for evaluation with complaints of lower back pain which shoots down to his lower extremities and right knee pain. Today's exam revealed restricted range of motion to the lumbar spine as well as the patient's left knee. Today's exam revealed findings of gait disturbance as well as swelling and atrophy to the right leg. Today's exam revealed findings of persistent internal derangement to the right knee as evidenced by restricted range of motion with positive provocative orthopedic test that correlate well with his MRI findings. Additionally, the patient has findings of lumbar nerve compression as evidenced by positive straight leg raise test. It is my professional opinion, with a reasonable degree of medical certainty, that today's evaluation and findings represent objective evidence of persistent orthopedic impairment to the patient's lower back and right knee. It is also my opinion, if the history provided in the medical record is true and accurate that the accident as outlined above is the cause of the patient's injuries and orthopedic impairments. It is also my opinion, given the nature of the patient's injuries that continues with objective pain and abnormal physical findings which has had sufficient time to resolve that the patient's impairment are permanent....

(See, Dassa Report)

### C. Legal Analysis

Defendants presented persuasive evidence that Plaintiff's alleged right knee issues were related to his preexisting condition and not to the June 2018 accident, to wit:

- the existence of serious knee problems requiring surgical intervention in the 1970's;
- a prior accident resulting in renewed injury to the right knee in 2017;
- an MRI taken shortly after the June 2018 accident which revealed pre-existing conditions and degenerative changes, but no evidence of traumatically induced injury;
- good range of motion in the right knee one week after the June 2018 accident;
- Dr. Hendler's opinion, based *inter alia* on the foregoing, that the contusion or minor sprain Plaintiff sustained at the time of the June 2018 accident had completely resolved, and the residual ligamentous laxity in his right knee was secondary to his chronic knee condition that not caused by the subject accident.

Therefore, Plaintiff was under an obligation to address the defense expert's findings and present

competent, non-conclusory expert evidence explaining how the subject accident exacerbated his pre-existing condition, and demonstrating that his claimed injury was proximately caused by the accident at issue, and not by a different accident or by a pre-existing condition.

Plaintiff completely defaulted. Dr. Dassa's report was authored three weeks prior to Dr. Hendler's examination, and does not address Dr. Hendler's findings at all. Furthermore, Dr. Dassa's opinion on the cause of Plaintiff's knee injury is wholly conclusory and does not deal meaningfully with the evidence of Plaintiff's prior knee surgery, prior accident or pre-existing degenerative knee condition at all. Consequently, Plaintiff has failed to demonstrate the existence of any triable issue of fact on the question whether the exacerbation of his pre-existing right knee condition constituted a "serious injury" causally related to the June 19, 2018 accident.

The issue with respect to the lumbar spine is closer, as Dr. Hendler notes Plaintiff's pre-existing degenerative condition without specifically attributing Plaintiff's post-June 2018 symptoms thereto. Plaintiff nevertheless has failed to demonstrate the existence of a triable issue of fact because Dr. Dassa does not even acknowledge Plaintiff's preexisting degenerative condition of the lumbar spine, and vaguely diagnoses "musculoligamentous injury" with no radiologic evidence of traumatic injury. Moreover, neither Dr. Dassa nor the Plaintiff accounts for complete termination of all medical treatment in March 2019, just nine months after the accident, or the resulting 15 month gap between that time and Dr. Dassa's examination in June 2020, which breaks the chain of causation and renders Dr. Dassa's opinion on causation speculative and insufficient to raise an issue of fact.

**D. Plaintiff's Motion For Partial Summary Judgment**

Given Defendants' entitlement to summary judgment and dismissal of the complaint on the ground that Plaintiff did not sustain a "serious injury" causally related to the June 19, 2018 accident, his motion for partial summary judgment on liability is denied as moot.

It is therefore

ORDERED, that Defendants' motion for summary judgment is granted, and the Plaintiff's complaint is hereby dismissed, and it is further

ORDERED, that Plaintiff's motion for partial summary judgment on liability is accordingly denied as moot.

The foregoing constitutes the decision and order of the Court.

Dated: March 17, 2021  
Goshen, New York

E N T E R



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HON. CATHERINE M. BARTLETT, A.J.S.C.