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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CHUNG S. KIM,

Plaintiff,

– against --

CITY OF NEWBURGH, CITY OF NEWBURGH DEPARTMENT OF PUBLIC WORKS AND BRIAN C. BEADLE

Defendants.

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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. EF008434-2019

Action No. 1

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Index No. EF001148-2019

CHARLES KIM AND GYEWAN KIM,

Plaintiffs,

Action No. 2

-against--

DECISION AND ORDER

Motions Date: August 3, 2021

CITY OF NEWBURGH, BRIAN C. BEADLE AND CHUNG S. KIM

Defendants.

Motions:
Action No. 1 Motion #2
Action No. 2- Motions ## 1-4

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The following papers numbered 1 to 23 were read and considered on (1) a motion by the (Plaintiff) Chung S. Kim in Action No. 1, pursuant to CPLR 3212, for summary judgment on the issue of liability; (2) a motion by the (Defendant) Chung S. Kim in Action No. 2, pursuant to CPLR 3212, for summary judgment dismissing the action and all cross claims insofar as asserted against him; (3) a cross motion by the Plaintiffs Charles Kim and Gyewan Kim in Action No. 2, pursuant to CPLR §3212, granting them summary judgment on the issue of liability, dismissing the affirmative defenses of comparative fault interposed by the Defendants City of Newburgh and Brian Beadle, and dismissing the cross claims as against Chung S. Kim; and (4) a cross motion by the Defendants City of Newburgh, City of Newburgh Department of Public Works and Brian Beadle, pursuant to CPLR 3212, to dismiss all claims and cross claims of Chung S. Kim on the

ground that he did not suffer a serious injury within the meaning of the no-fault laws.[1]

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Upon the foregoing papers, it is hereby,

ORDERED, that the motions and cross motions are denied.

Factual/Procedural Background

The two actions at bar arise from a motor vehicle accident.

According to a police report of the accident, on September 25, 2018, Brian Beadle was driving a pick-up truck owned, etc. by the City of Newburgh and the City of Newburgh Department of Public Works (hereinafter referred to collectively as the "City Defendants") backward down a one-way street in the wrong direction when it struck a vehicle being driven by the Chung S. Kim driving on a cross street. The Beadle vehicle was traveling west, and the Kim vehicle was traveling north. According to the report, the rear of the Beadle vehicle made contact with the front of the passenger's side of the Kim vehicle.

Charles Kim and Gyewan Kim were passengers in the Kim vehicle.

Chung Kim commenced an action arising from the accident against the City Defendants

[1] The Court notes that the electronic files in the actions have become somewhat confused. However, the relief being sought is not, although there is some duplication of the relief being sought by Chung Kim. Thus, although five motions are being resolved by this order, there are only four distinct requests for relief, and the decision is drafted accordingly.

and Beadle (hereinafter "Action No. 1).

Charles Kim and Gyewan Kim commenced an action against the City of Newburgh (hereinafter "City"), Beadle and Chung Kim (hereinafter "Action No. 2").

The actions have been joined for purposes of disclosure and trial.

A note of issue has been filed in each.

The Motions of Chung Kim

In Action No. 1, Chung Kim (as Plaintiff) moves for summary judgment on the issue of liability.

Chung Kim argues that it is clear from the police report and the examinations before trial that Beadle is at fault in the happening of the accident, to wit: the accident occurred due to the negligence of Beadle, who was driving his vehicle in violation of Vehicle and Traffic Laws sections 1110(a), 1127(a), 1211(a) and 1212.

Chung Kim argues that the City Defendants may be held vicariously liable for the conduct of its employee, Beadle.

In Action No. 2, Chung Kim (as a Defendant) moves for summary judgment dismissing complaint and all cross claims insofar as asserted against him for the same reasons argued *supra*.

In opposition to the motions, the City Defendants and Beadle submit an affirmation from counsel, Sanford Jacobs.

Initially, Jacobs notes, Chung Kim's motion papers fail to comply with Administrative Order 270.20, which went into effect on March 1, 2021. Pursuant to the same, a motion for summary judgment must include a statement of facts, an affirmation and memorandum of law, and a word count. Here, he notes, this was not done. Thus, he argues, the motions should be

denied on that basis alone.

In any event, he argues, the motions should be denied on the merits due to conflicting evidence as to the happening of the accident, to wit: testimony and evidence that, just prior to the accident, Beadle was backing his pickup truck "slowly and carefully" out of West Parmenter Street with an "extremely noticeable flashing yellow light on its roof," when he saw Chung Kim's vehicle and stopped, and Chung Kim's vehicle struck his vehicle.

Thus, Jacobs asserts, there are issues of fact concerning comparative fault, and Chung Kim's motions should be denied.

Appended to the opposition papers is, *inter alia*, a transcript of Beadle's testimony at an examination before trial.

Concerning the accident, the following colloquy occurred.

Q. Where were you headed to, Mr. Beadle?

A. I was reversing, I was heading from one truck to another truck. I was picking up one man from the back of a garbage truck and I was transporting him to another garbage truck.

Q. And the location of the accident, is that part of the location of the building? Describe it, is that a parking lot, is that a side street? Where did the accident occur exactly?

A. The accident occurred, I was backing on West Parmenter Street, I was backing towards Route 9W which is a state highway.

Q. Can you describe the streets, are those one-way streets?

A. Yes, it is. West Parmenter is a one-way street, the direction of travel is eastbound, I was backing westbound with my roof lights on.

Q. Do you know what was your approximate speed at the time of the accident?

A. No, I'm not sure what my speed was, I was reversing, Probably at a walking pace.

Q. Were there any

MR. WALSH: Wait, objection, do you mean at the moment of impact, the actual impact?

MS. ZALOGA: Well, what I was going to ask is immediately prior to the impact what was his speed. Approximate.

MR. WALSH: Okay.

A. My speed as I was backing up was approximately at walking pace, as I got to the intersection, I came to a complete stop.

Q. During while you were backing up, did you observe any vehicles to any side of your vehicle?

A. Yes, there were cars parked on both sides of the road. There was a garbage truck in front of me that was stopped, the men were picking up garbage, that's why I had to reverse out of the street and I got up to the intersection. I stopped, looked both ways on Route 9W, when I looked south, which is the direction that your client [Chung Kim] was coming from, I saw him coming, I stopped, put the truck into -- out of reverse, into drive and that's when he hit me.

Q. What is the first time that you saw my client's vehicle?

A. Just prior to him hitting me.

Q. At the time was your car stationary or were you still moving backward, were you still backing up?

A. No, I had stopped.

Q. The street that my client's vehicle was driving on, I believe that's Hasbrouck Street, can you describe that street, is that a two-way street, one-way street?

MR. WALSH: Wait, we believe your client was on Route 9W, which is also known as Robinson Avenue in that location.

Q. Mr. Beadle, can you describe Robinson Avenue on the day of the accident, is it a one-way, two-way street?

A. Robinson Avenue is a two-way street, single lane, both directions. There is parking on the northbound side, there is no parking on the southbound side,

Q. How did you realize that an accident occurred, what was the first thing you remember?

A. As I stopped, I reached to take my truck from reverse into drive and then I felt the other car hit me.

(Exhibit D).

The Cross Motion of Charles Kim and Gyewan Kim

In Action No. 2, the Plaintiffs Charles Kim and Gyewan Kim cross move for an order granting them summary judgment on the issue of liability as against the City of Newburgh and Beadle, and dismissing those Defendants' affirmative defenses of comparative fault and cross claims as against Chung Kim.

In support of the cross motion, Charles Kim and Gyewan Kim submit an affirmation from counsel, Corey Strauss.

Strauss asserts that the accident occurred because Beadle, who had an obstructed view of South Robinson Avenue due to a parked box truck, was driving his vehicle in reverse, the wrong way on a one-way secondary road, and entered the path of travel of Kim's vehicle.

Thus, he argues, Beadle is solely at fault in the happening of the accident.

The Cross Motion of the City Defendants and Beadle

The City Defendants and Beadle move to dismiss all claims and cross claims of Chung Kim as against them on the ground that he did not suffer a serious injury within the meaning of the no-fault laws.

In support of the motion, they submit an affirmed report of Robert C. Hendler, an orthopedist.

In the report, Dr. Hendler notes that he performed an independent orthopedic medical

evaluation of Chung Kim of November 18, 2020. Dr. Hendler also reviewed various medical records.

Dr. Hendler found as follows.

Kim, then 77 years old, presented with a chief orthopedic complaint of neck, low back, right knee and right shoulder problems. Kim believed that, during the accident, his right knee may have struck the dashboard and his right shoulder may have struck the steering wheel of his vehicle.

As background, Dr. Hendler notes as follows.

After the accident, Kim was referred by his attorney to a legal accident clinic, where he was evaluated by Dr. Colin Clarke, a physiatrist and pain management physician. Dr. Clarke evaluated and recommended diagnostic testing and treatment.

The diagnostic testing was performed at Ozone Park Radiology. The reported findings were as follows:

- An MRI of the cervical spine was done on 11/10/18 showed a bulging and/or herniated disc at several levels, but no evidence of any significant herniated discs.

Dr. Hendler reviewed the study and concurred with the reported findings of the attending radiologist, Dr. Losik, to wit: that there are herniated/bulging discs at C4-C5, C5-C6 and C6-C7.

- An MRI of the lumbar spine was done on 11/17/18. It showed a small bulging/herniated disc at L4-L5, which appeared to be degenerative in nature. There were also bulging discs seen at L2-L3 and L3-L4.

Dr. Hendler reviewed the study and concurred with the reported findings of the attending radiologist, Dr. Losik.

Electrophysiologic testing was performed of the lower extremities on 2/13/19, and it was

a normal study.

EMG testing of the upper extremities was also performed on 2/13/19, and showed no evidence of any cervical radiculopathy.

Bilateral carpal tunnel syndrome was seen.

Chung Kim's neck and back were treated with physical therapy, acupuncture and chiropractic.

Dr. Clarke ordered MRIs on Kim's right knee and right shoulder. The findings were as follows:

- MRI of the right knee was performed on 11/3/18, and showed a tear of the anterior cruciate ligament and a Gr. II signal of the medial meniscus, which is not consistent with a torn meniscus.

- MRI of the right shoulder was also performed on 11/3/18. It showed partial tearing of the supraspinatus tendon and infraspinatus tendon, and a tear of the labrum. There was also degenerative change noted in the glenohumeral joint with degeneration and a capsular sprain.

Chung Kim was referred to Dr. Sanford Wert, an orthopedic surgeon, for his right shoulder and right knee. Dr. Wert recommended surgery for the right shoulder.

On 2/22/19, Dr. Wert performed an operative arthroscopy of the right shoulder.

Dr. Hendler reviewed the operative report. Dr. Wert performed a manipulation under general anesthesia, and performed essentially a debridement of the shoulder joint with subacromial decompression.

Dr. Hendler opines, to a reasonable degree of medical certainty, that the findings at the time of this surgical procedure, and on the MRI study, are not posttraumatic in nature, but are

degenerative in nature.

Postoperatively, Chung Kim had physical therapy for his right shoulder.

His right knee was treated with physical therapy only.

Chung Kim was not presently under any active orthopedic care for his neck, lower back, right knee or right shoulder.

Other than the above, Dr. Hendler, noted, no other significant orthopedic treatment was rendered to Chung Kim subsequent to the accident of record.

At the time of his examination, Chung Kim complained of intermittent aches, pain and stiffness in his cervical spine, with radiation of the pain down his right arm down to the forearm. There was no present numbness, weakness or paresthesias are reported in the upper extremities.

With regard to his lumbar spine, he complained of intermittent aches and pain, along with stiffness, with radiation of the pain to the right knee, but not further down the leg. There was no present numbness, weakness or paresthesias reported in the lower extremities. Coughing and sneezing did not affect his symptoms. Lying down did not relieve his symptoms.

With regard to his right shoulder, Chung Kim found the surgery mildly helpful. He complained of continued fairly frequent aches and pain. He did not complain of any decreased motion or any weakness.

With regard to his right knee, he complained of intermittent aches and pain, mostly on the anterior aspect. He reported some swelling, but no locking or buckling of the knee.

On physical examination, Dr. Hendler documented ranges of motion visually and with the use of a handheld goniometer, inclinometer and tape measure. He found as follows.

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 any atrophy in 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 l+ and brachial radialis 1+, and all were equal bilaterally. There was a nonnal 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 hallux 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. He walked with a normal gait and stood on tiptoes and heels without difficulty.

Examination was performed of both knees. Range of motion was full with normal values of 0- 140 degrees bilaterally. Neither knee had any joint line tenderness. There was no effusion present in either knee. There was no ligamentous laxity to valgus or varus stress testing bilaterally. Anterior and posterior drawer and Lachman's tests were negative bilaterally. There was no 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.

Examination was performed of both shoulders. There were three, small, well-healed, 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, there was similar slight decreased range of motion of both shoulders with forward flexion and abduction both being limited to 150 degrees (normal = 180 degrees), with the remaining values being normal with 80 degrees of internal and external rotation, 45 degrees of adduction and 50 degrees of extension bilaterally.. 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 at Dr. Hendler's office on 11/18/20 as follows:

Lumbar Spine: X-ray findings show a normal lumbar lordosis. There was marked degenerative joint disease and degenerative disc disease seen throughout the lumbar spine area.

Cervical Spine: X-ray findings show a normal cervical lordosis. There was a mild amount of degenerative joint disease and degenerative disc disease seen throughout the cervical spine area.

Right Shoulder: X-ray findings show osteoarthritis of the acromioclavicular joint. There were no soft tissue calcifications or arthritic change of the glenohumeral joint.

Right Knee: X-ray findings show the joint space to be well maintained. There is no evidence of any fractures or dislocations. Articular surface of the patella appears to be free of any arthritic or degenerative change. There is no evidence of any soft tissue calcifications present.

Dr. Hendler concludes as follows.

From my history, physical examination, x-rays and review of the submitted medical records, along with films on CDs, and if the history stated by Mr. Kim is correct, at the time of the accident of record he sustained cervical and lumbosacral sprains, with temporary exacerbation of pre-existing degenerative joint disease and degenerative disc disease in the neck and lower back areas. With regard to his right knee, he stated that his knee hit the dashboard of his vehicle at the time of the accident of record, and he may have sustained a mild contusion to the right knee. He also gave a mechanism of injury for his right shoulder striking the steering wheel, which would have caused a simple contusion. Present physical examination of his neck and lower back is normal. There are no positive objective tests, 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 neck or low back, or a cervical or lumbar radiculopathy. Based on a normal physical examination, there is no present disability, and he will have no permanent findings in his neck or lower back that would be causally related to the accident of record. Present physical examination of his right knee is completely normal. Based on a normal physical examination, there is no present disability and he will have no permanent findings in his right knee that would be causally related to the accident of record.

With regard to the right shoulder, the findings on the post-accident MRI study and at the time of Dr. Wert's surgical procedure, pre-existed the motor vehicle accident of record, and were degenerative in nature. He has good surgical result. It is my opinion, with a reasonable degree of medical certainty, that he will not have any permanent functional

> loss of use of his right shoulder that would be causally related to the accident of record. The need for the surgical procedure performed by Dr. Wert is not causally related to the motor vehicle accident of 9/25/18, but is due to pre-existing conditions. If possible, I would like to review the color intraoperative photographs taken at the time of this surgical procedure.
>
> No further causally related orthopedic treatment is indicated. The overall prognosis is considered good.

(Cross Motion, Exhibit J).

In opposition to the cross motion of the City Defendants and Beadle, Chung Kim submits an affirmation from his attorney, Thomas Bernard.

Bernard argues that the cross motion must be denied for three reasons.

First, Dr. Hendler did not address the 90/180 days category under the no-fault law. Thus, he argues, the Defendants did not meet their burden on a motion for summary judgment.

Second, he asserts, Dr. Hendler's report confirms that Chung Kim has substantial limitations of motion.

Third, he argues, there are many genuine issues of material fact regarding whether Plaintiff sustained a "serious" injury under New York's no-fault law.

In short, he contends, the medical records show that Chung Kim sustained right shoulder tears requiring surgery, right knee tears, lumbar spine herniations/bulges and cervical spine herniations/bulges as a result of the accident. Further, that he has restricted ranges of motion in his right shoulder, right knee, cervical and lumbar spines, that resulted in qualitatively assessed limitations in his physical activities. These medical findings are supported by objective tests such as MRI films.

As such, he argues, Chung Kim suffered a serious injury under the no-fault law.

In further opposition to the motion, Chung Kim submits an affirmed report of Jerry Lubliner, M.D., an orthopedist.

Based on an examination on August 9, 2021, Dr. Lubliner found as follows.

Range of motion of the neck is as follows: He will flex 35 degrees; extend 30 degrees, laterally flex 40 degrees and laterally rotate 50 degrees. He has pain on motion to the left between C3 and C6. He has pulling on all other motions. Normal range of motion of the cervical spine is flexion to 40 degrees, extension to 40 degrees: lateral flexion to 60 degrees and lateral rotation to 80 degrees. He has a negative Spurling test.

He has well-healed scars of the right shoulder. Range of motion of the shoulders is as follows: forward flexion on the right is 100 degrees; left is 150 degrees. Abduction on the right is 90 degrees; left is 140 degrees. External rotation on the right is vertical minus 10 degrees; left is vertical. Internal rotation on the right is to L3, left is to L2, The patient has superior pain at the limits of all motion on the right and no pain at the limits of motion to the left. Normal range of motion of the shoulders is forward flexion of 180 degrees, abduction of 180 degrees; external rotation to the vertical and internal rotation to T10.

* * *

In regard to the lower back, he will flex 70 degrees; extend 30 degrees, laterally flex 30 degrees and laterally rotate 30 degrees complaining of pain at the limits of all motion in the lumbosacral junction. Normal range of motion of the lumbosacral spine is flexion to 90 degrees, extension to 40 degrees, lateral flexion to 60 degrees and internal rotation to 80 degrees.

* * *

Range of motion of the right knee is 0 to 110 degrees; left knee is 0 to 120 degrees. Normal range of motion of the knees is flexion of 0 to 140 degrees. .

* * *

[He] reviewed the MRI report to the right shoulder dated 11/0a/2018 showing high grade tears of the supraspinatus, infraspinatus and tear of the labrum.

[He] reviewed the MRI report to the right knee dated 11/08/2018 that states tear of the ACL and Grade II signal of the posterior horn of the medial meniscus.

[He] reviewed the MRI report to the cervical spine dated 11/10/2018 showing hemiations at C4, C5-6 and C6-7.

> [He] reviewed the MRI report of the lumber spine dated 11/17/2018 showing bulging disk at L2-3, LS-4 and herniated disk st L4-5.
>
> IMPRESSION:
>
> The patient was in a motor vehicle accident on 09/25/2018 and suffered injuries to his right shoulder right knee, neck and back. The patient had MRIs that showed bulging disks in his lower back; herniated disk in his back and three herniated disks in his neck. He had the surgery as described. At this time, the patient has and will continue to have permanent impairments/conditions. He has and will continue to have permanent scarring, permanent loss of range of motion, permanent weakness, permanent symptomatic infringement of the right shoulder, permanent atrophy of the right upper arm, permanent recurrent radiculopathy down the right tower extremity, permanent recurrent pain and permanent limitation of his activities of daily living,
>
> The accident of 09/25/2018 is the competent cause for injuries to his neck, back, right shoulder and right knee, for symptomatic herniations at C4-5, C6-8 and CS-7, for symptomatic herniations at L45, for symptomatic impingement of the right shoulder and for recurrent pain to the right knee.
>
> The accident of 09/25/2018 is the competent cause for the need for treatment, for the need for surgery and for the permanent impairments/conditions as described.

(Opposition, Exhibit D).

In reply, the City Defendants and Beadle submit an affirmation from counsel, Sanford Jacobs.

First, Jacobs notes, Chung Kim failed to respond to the Defendants' Statement of Undisputed Facts in support of his cross motion, as required under the New York State Unified Court Rules. Thus, he asserts, Chung Kim has "admitted" the following: That he did not sustain a fracture to his body; a dismemberment of any part of his body; a permanent loss or use of a body organ, member, function or system, permanent consequential limitation of a body organ or member, significant limitation of use of a body function or system as a result of this accident; or an an injury or impairment of a non permanent nature which prevents him from performing

substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety (90) days during a 180 days immediately following the occurrence of the injury or impairment; that he did not seek medical treatment until approximately one week after the accident, that he continued to work on the day of the accident, and that worked most of the day; that he worked after the day of the subject accident; and that he did not miss any work as a result of the accident.

Otherwise, Jacobs asserts, the Defendants are entitled to summary judgment because they tendered medical proof that demonstrated, *prima facie*, that Chung Kim did not sustain a "serious injury" within the meaning of no fault law.

Finally, Jacobs argues, in opposition to the cross motion, Chung Kim failed to tender competent medical proof sufficient to raise a triable issue of fact. That is, Chung Kim failed to properly set forth a physician's affidavit of medical records which substantiate his claim that he sustained a "serious injury" under the New York Insurance Law. Rather, Jacob's notes, he attached medical records which were not certified.

Discussion/Legal Analysis

As a threshold issue, the Court notes as follows.

Effective February 1, 2021, 22 NYCRR § 202.8-g provides:

(a) Upon any motion for summary judgment other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

(b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which

it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b) including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.

Further, 22 NYCRR § 202.8-b provides in relevant part.

(a) Unless otherwise permitted by the court: (i) affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 7,000 words each; (ii) reply affidavits, affirmations, and memoranda shall be no more than 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief.

(b) For purposes of paragraph (a) above, the word count shall exclude the caption, table of contents, table of authorities, and signature block.

© Every brief, memorandum, affirmation, and affidavit shall include on a page attached to the end of the applicable document, a certification by the counsel who has filed the document setting forth the number of words in the document and certifying that the document complies with the word count limit. The counsel certifying compliance may rely on the word count of the word-processing system used to prepare the document.

Here, as noted by the Defendants, Chung Kim did not support his motions for summary judgment with the papers required *supra* (although Chung Kim claims to have complied with the word count requirement). Nor was this omission corrected on subsequent submissions. Thus, the issue is raised whether this, without more, requires denial of the motion. The Court concludes it does not.

Given the relatively new nature of the rule, there is scant case law.

In *Amos Financial LLC v. Crapanzano*, – Misc3d – [S.Ct. Rockland County; July 30,

2021], Justice Berliner held as follows.

> Uniform Rule 202.8-g is not precatory or discretionary in its application: it is a mandate on all summary judgment movants in this State. Consistent with Judiciary Law section 213(2)(b), the Chief Administrative Judge — on the advice and consent of the Administrative Board of the Courts, comprising the Chief Judge and the four Presiding Justices of the Appellate Divisions (see NY Const, art VI, § 30) — promulgated this rule of practice and procedure to vindicate substantial judicial economy interests for both bar and bench. These interests have been the focus of extensive discussion, and years of experience, concerning the Commercial Division predicate to Uniform Rule 202.8-g(a) *(see 22 NYCRR* [Uniform Rules of the Commercial Division] § 202.70, Rule 19-a). Plaintiff's motion ignores Uniform Rule 202.8-g entirely, along with its constitutional, statutory and administrative predicates, and its underlying policy objectives. Thus, plaintiff's motion is procedurally defective on its face.
>
> Less immediately clear is what the remedy should be for such a facial violation of Uniform Rule 202.8-g — a question that appears to be one of first impression in this State. A recent trial court case held that a party admits all facts in a Rule 202.8-g Statement of Material Facts by failing to oppose it compatibly with that Rule *(see Reus v. ETC Housing Corporation*, 72 Misc. 3d 479, 148 N.Y.S.3d 663, 2021 NY Slip Op 21130 [Sup. Ct. Clinton Co., 2021] [applying Uniform Rule 202.8-g(d)]). That case also appeared to be one of first impression, and stands somewhat orthogonal to others arising under the Commercial Division Rule 19-a predicate for Uniform Rule 202.8-g. Those other cases have held that courts enjoy discretion to deem material facts admitted by respondents whose opposition failed to comply with Rule 19-a. Those cases declined to impose an inflexible mandate or even presumption to assume admission by Rule 19-a violation (*see Abreu v. Barkin & Assocs. Realty, Inc.*, 69 A.D.3d 420, 421, 893 N.Y.S.2d 25 [1st Dept. 2010]), and specifically held that trial courts abuse their discretion by hyper-technically applying Rule 19-a so as to prejudice an otherwise responsive opposition to summary judgment (see e.g. *Matter of Crouse Health Sys., Inc. v. City of Syracuse*, 126 A.D.3d 1336, 8 N.Y.S.3d 502 [4th Dept. 2015]).
>
> Here, however, it is the movant rather than the respondent that fails to submit CPLR 3212 motion papers in the form and with the content that the Chief Administrative Judge mandated. This distinction makes a difference. Unlike a summary judgment respondent entitled to the benefit of every possible favorable inference in opposition to the motion, a summary judgment movant enjoys no such presumption but rather must carry affirmatively its burden of proof.
>
> This Court therefore credits *Reus* and applies its also to a moving party. If a respondent failing to oppose a Rule 202.8-g Statement of Material Facts in the manner that Rule prescribes thereby admits those facts, then a fortiori a CPLR 3212 movant whose papers fail to satisfy the condition precedent of a Uniform Rule 202.8-g Material Statement of

Facts thereby fails properly to put those facts before the Court in the first instance.

This Court further holds that a summary judgment movant's total failure to submit a Uniform Rule 202.8-g Statement of Material Facts constitutes a violation that is neither merely technical nor without prejudice. Unlike minor technical "glitches," irregularities and harmless pleading errors that courts have substantial discretion to correct nunc pro tunc under CPLR 2101(f) and/or CPLR 2001, the total absence of a Uniform Rule 202.8-g Statement of Material Facts constitutes a substantive defect in a motion for summary judgment. As such, the CPLR 2101(f) directive to excuse minor defects in the form of papers cannot redeem a summary judgment movant's wholesale violation of Uniform Rule 202.8-g.

Even if a substantive Uniform Rule 202.8-g violation theoretically could fall within the ambit of CPLR 2101(f), that statute's directive to excuse defects in the form of pleadings applies only where "a substantial right of a party is not prejudiced." A summary judgment movant that entirely ignores Uniform Rule 202.8-g, however, can prejudice a respondent by offering motion papers that — as plaintiff's papers do here — functionally bury in a voluminous record the relevant allegations of fact and their evidentiary basis. The policy objective to avoid that impairment to cost-effective practice and judicial economy was precisely why the Judiciary promulgated Rule 202.8-g in the first place. Were trial courts to ignore a wholesale Rule 202.8-g violation, courts thereby would peril not just that rule and its constitutional and statutory predicates, but also the other efficiency reforms that the Judiciary enacted with it.

Such a finding of prejudice especially obtains under the instant facts and circumstances. This summary judgment application was exempt from electronic filing when plaintiff filed it, thus obligating respondent — and this Court — to sift through an extensive paper record without the substantial efficiency reforms that Uniform Rule 202.8-g would have achieved. This prejudice is particularly manifest on this third of plaintiff's summary judgment motions. This Court also observes that defendants appear pro se, which magnifies the resulting prejudice.

Amos Financial LLC v. Crapanzano, *supra*; *see also, Priority 1 Sec., LLC v. Childrens Community Services Inc.*, – Misc3d – NY S. Ct.; Frank, J: October 4, 2021 [error overlooked]; De Leon v. Kagansky, – Misc3d – [Kings S. Ct.; Wan, J.; September 30, 2021][error substantive in nature and not overlooked]; *Reus v. ETC Housing Corporation*, 72 Misc.3d 479 [Lawliss, J.; May 6, 2021].

As noted in *Amos Financial, LLC (supra)*, there is a substantial identity of wording

between Rule 19-a of 22 NYCRR 202.70 (applicable to commercial cases), and 22 NYCRR Rule 202.8-g, as it concerns the filing of a statement of facts and the consequence of failing to respond to the same. The Court notes that the Appellate Courts which have ruled on the same have uniformly held that a motion for summary judgment need not be denied based on the failure, without more, to provide or respond to a statement of facts. *See e.g.*, *Vaccari v. Vaccari*, 172 A.D.3d 58 [1st Dept. 2019]; *Crouse Health System, Inc. v. City of Syracuse*, 126 A.D.3d 1336 [4th Dept. 2014]; *Al Sari v. Alishaev Bros., Inc.*, 121 A.D.3d 506 [1st Dept. 2014]; *SIEGEL-NYPRAC § 281*, Proof on Summary Judgment Motion ["it would appear that a court has discretion to deny a motion for summary judgment under the new Uniform Rules even if an opponent does not submit a corresponding response to the movant's statement of material facts as required by Uniform Rule section 202.8-g(b). The court should be more apt to exercise that discretion while Uniform Rule 202.8-g is still in its infancy"].

Here, given the substantial identity of the wording between the two provisions, the Court will follow the guidance of the Appellate case law arising under Rule 19-a. That is, the Courts retain discretion whether to grant or deny a motion for summary judgment based solely on the failure to strictly comply with Rule 202.8-g(b).

However, counsel is admonished to comply with the rule going forward.

In any event, the Court notes, this determination is academic because the Court would nonetheless deny Chung Kim's motions for summary judgment.

A party seeking summary judgment bears the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law by tendering competent evidence in admissible form sufficient to eliminate any triable, material issues of fact from the case. If the moving party fails

to meet this burden, the papers submitted in opposition need not be considered. If the moving party makes such a *prima facie* showing, the burden shifts to the opposing party to demonstrate the existence of an issue of fact requiring a trial. *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]; *Dempster v. Liotti*, 86 A.D.3d 169 [2nd Dept. 2011].

There can be more than one proximate cause of an accident. *Adobea v. Junel*, 114 A.D.3d 818 [2nd Dept. 2014]. This is because each driver has a duty to exercise reasonable care under the circumstances to avoid an accident. *Adobea v. Junel*, 114 A.D.3d 818 [2nd Dept. 2014]. An operator of a motor vehicle traveling with the right-of-way has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles. *Fried v. Misser*, 115 A.D.3d 910 [2nd Dept. 2014]. Thus, a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident. *Adobea v. Junel*, 114 A.D.3d 818 [2nd Dept. 2014]. However, a driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision. *Adobea v. Junel*, 114 A.D.3d 818 [2nd Dept. 2014].

To prevail on a motion for summary judgment on the issue of liability in a negligence case, the movant need no longer demonstrate that he or she was free from comparative fault. *Davis v. Commack Hotel, LLC*, 174 A.D.3d 501 [2nd Dept. 2019].

A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law. *Adobea v. Junel*, 114 A.D.3d 818 [2nd Dept. 2014]. The driver with the right-of-way is entitled to anticipate that the other motorist will obey traffic laws which require him or her to yield. *Adobea v. Junel*, 114 A.D.3d 818 [2nd Dept. 2014].

Here, it is not, and cannot be, disputed that Beadle violated various provisions of the Vehicle and Traffic Law, *e.g.*, Vehicle and Traffic Law § 1127 ["Upon a roadway designated and signposted for one-way traffic, a vehicle shall be driven only in the direction designated"]; Vehicle and Traffic Law § 1211 ["driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic]. Thus, Beadle was negligent in the happening of the accident as a matter of law.

Consequently, Chung Kim demonstrated a *prima facie* entitlement to judgment as a matter of law on the issue of liability as against Beadle and the City Defendants.

However, in opposition, Beadle and the City Defendants raised a triable issue of fact whether Chung Kim was contributorily negligent in the happening of the accident with Beadle's testimony that he saw Chung Kim and stopped, and that Chung Kim's vehicle struck his vehicle. The Court notes that there are photographs in the record which appear to support this version of the happening of the accident, to wit: Exhibit F to the opposition papers (EF001148-2019, Item # 41).

Significantly, the Court notes, Chung Kim denies that he struck Beadles' truck. Rather, he testified, the truck struck his vehicle.

Given such, both of Chung Kim's motions for summary judgment are denied.

Further, for the same reasons, Charles Kim and Gyewan Chung are not granted summary judgment on the issue of liability as against the City and Beadle only.

Thus, the Court denies those branches of the cross motion of Charles Kim and Gyewan Kim which are for summary judgment on the issue of liability as against the City of Newburgh and Beadle, and which are to dismiss the affirmative defenses of those Defendants alleging

contributory negligence.

The Court finds that Charles Kim and Gyewan Kim lack standing to seek the dismissal of the cross claims of the City and Beadle as against Chung Kim, and denies that branch of the motion.

Finally, the Court denies the cross motion of the City Defendants and Beadle to dismiss the claims of Chung Kim on the ground that he did not suffer a "serious injury" within the meaning of the no-fault law.

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 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 te 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 plaintiffs 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 plaintiffs 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 catergories of injuries alleged in the bill of particulars. *Silan v. Sylvester*, 122 A.D.3d 713 [2nd Dept. 2014].

Here, in his bills of particulars, the Plaintiff alleges, *inter alia*, as follows:

RIGHT SHOULDER

• SURGERY PERFORMED ON FEBRUARY 22, 2019.

• POST-OPERATIVE DIAGNOSIS: TEAR OF THE ANTERIOR SUPERIOR LABRUM; ROTATOR CUFF TEAR; HYPERTROPHIC SYNOVITIS; IMPINGEMENT SYNDROME; ADHESIVE CAPSULITIS AND ADHESIONS;

• PERMANENT SCARS ON THE RIGHT SHOULDER FROM SURGERY;

• PERMANENT DISFIGUREMENT AND DEFORMITY OF THE RIGHT SHOULDER;

• PERMANENT DISABILITY OF THE RIGHT SHOULDER;

• TEAR OF THE SUPRASPINATUS TENDON WITH TENDINOSIS CONFIRMED BY MRI PERFORMED ON NOVEMBER 3, 2018;

• TEAR OF THE INFRASPINATUS TENDON CONFIRMED BY MRI PERFORMED ON NOVEMBER 3, 2018;

• TENDINOSIS OF THE SUBSCAPULARIS TENDON CONFIRMED BY MRI PERFORMED ON NOVEMBER 3, 2018;

• TEAR OF HE LABRUM CONFIRMED BY MRI PERFORMED ON NOVEMBER 3, 2018;

• JOINT EFFUSION CONFIRMED BY MRI PERFORMED ON NOVEMBER 3, 2018;

• DECREASED RANGE OF MOTION

RIGHT KNEE

• TEAR OF THE ACL CONFIRMED BY MRI PERFORMED ON NOVEMBER 3, 2018;

• TEAR OF THE POSTERIOR HORN MEDICAL MENISCUS CONFIRMED BY MRI PERFORMED ON NOVEMBER 3, 2018;

• TENDINOSIS OF THE DISTAL PATELLAR TENDON CONFIRMED BY MRI PERFORMED ON NOVEMBER 3, 2018;

• JOINT EFFUSION CONFIRMED BY MRI PERFORMED ON NOVEMBER 3, 2018;

• DECREASED RANGE OF MOTION;

• THE NEED FOR FUTURE SURGERY;

LUMBAR SPINE

• L2-L3 DISC BULGE WITH ENCROACHMENT ON THE NEURAL FORAMINA CONFIRMED BY MRI PERFORMED ON NOVEMBER 17, 2018;

• L3-L4 DISC BULGE WITH ENCROACHMENT ON THE NEURAL FORAMINA CONFIRMED BY MRI PERFORMED ON NOVEMBER 17, 2018;

• L4-5 DISC HERNIATION WITH COMPRESSION OF ANTERIOR THECAL SAC WITH STENOSIS CONFIRMED BY MRI PERFORMED ON NOVEMBER 17, 2018;

• DECREASED RANGE OF MOTION;

CERVICAL SPINE

• C4-5 DISC HERNIATION WITH COMPRESSION OF VENTRAL THECAL SAC AND SPINAL CORD CONFIRMED BY MRI PERFORMED ON NOVEMBER 10, 2018;

• C5-6 DISC HERNIATION WITH COMPRESSION OF VENTRAL THECAL SAC AND SPINAL CORD. CONFIRMED BY MRI PERFORMED ON NOVEMBER 10, 2018;

• C6-7 DISC HERNIATION WITH COMPRESSION OF VENTRAL THECAL SAC AND SPINAL CORD. CONFIRMED BY MRI PERFORMED ON NOVEMBER 10, 2018;

• DECREASED RANGE OF MOTION;

Further, Chung Kim alleges, he was confined to home for approximately three (3) months following the accident and for an additional three (3) months following his right shoulder surgery performed on February 22, 2019 and intermittently to date; he was confined to bed for approximately for approximately one day following the accident and two days following his right

shoulder surgery; and he was disabled for approximately three (3) months following the accident and for an additional three (3) months following his right shoulder surgery performed on February 22, 2019 and remains partially disabled to date.

Here, the Court finds, the submissions of the City Defendants and Beadle were insufficient to demonstrate, *prima facie*, that Chung Kim did not suffer a "serious injury" as alleged under any category. [2] In any event, in opposition, Chung Kim raised triable issues of fact whether he suffered a "serious injury." In particular, the affirmed report of Dr. Lubliner.

Finally, the Court notes, it declines to apply preclusive effect to Chung Kim's failure to directly respond to the Defendants Statement of Facts. *22 NYCRR 202.8-g.* However, the Court notes, several of the categories of injuries addressed therein are not alleged.

The Court notes that one of the parties herein appears to have died, to wit: Charles Kim. Consequently, in general, all proceedings are stayed. Thus, the status conference scheduled below is to discuss whether the cases will go forward without Charles Kim, or what efforts need be made to secure a representative of his estate.

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

ORDERED, that the motions and cross motions are 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.

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[2] The motion practice at bar was fully submitted prior to Charles Kim's death.

The foregoing constitutes the decision and order of the court.

Dated: October 18, 2021
Goshen, New York

ENTER

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